Supreme Court, U.S.
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No. __-____ (1)

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IN THE

Supreme Court of the United States

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit corporation,

Petitioner,

—v.—

CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

JONATHAN R. DONNELLAN
JOEL KURTZBERG
MATTHEW A. LEISH
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

PAUL M. LEVY
PHILLIP J. ZISOOK
BRIAN D. SAUCIER
DEUTSCH, LEVY & ENGEL, CHARTERED
225 W. Washington Street, Suite 1700
Chicago, Illinois 60606
(312) 346-1460

FLOYD ABRAMS
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner

January 12, 2000

120PP

QUESTION PRESENTED

Whether a Chicago Ordinance that essentially bans all publicly visible advertising of cigarette products is preempted by Section 5(b) of the Federal Cigarette Labeling and Advertising Act as a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes . . . ."

PARTIES BELOW

The parties before this Court are those set forth in the caption, which are the same parties that appeared in the United States Court of Appeals for the Seventh Circuit.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Federation of Advertising Industry Representatives, Inc. ("FAIR") states that it has no parent corporations. FAIR is an Illinois not-for-profit corporation consisting of Eller Media Co., Whiteco Outdoor and Outdoor Systems, Inc. Eller Media Co. is wholly owned by Clear Channel Communication, Inc. Whiteco Outdoor is wholly owned by Lamar Advertising Company. Outdoor Systems, Inc. is wholly owned by Infinity Broadcasting Corporation, a subsidiary of CBS Corporation. Clear Channel Communication, Inc., Lamar Advertising Company and Infinity Broadcast Company are publicly held companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this case on September 1, 1999.

OPINIONS BELOW

The July 29, 1998 memorandum opinion and order of the United States District Court for the Northern District of Illinois (Shadur, J.) is reported at 12 F. Supp. 2d 844 (N.D. Ill. 1998). It is reprinted in the Appendix hereto at 14a-34a. The September 1, 1999 opinion of the Court of Appeals for the Seventh Circuit is reported at 189 F.3d 633 (7th Cir. 1999). It is set forth in the Appendix at 1a-13a. The October 14, 1999 order of the Court of Appeals denying rehearing *en banc* is unreported and is set forth in the Appendix at 35a-36a.

JURISDICTION

Jurisdiction of this Court to review the judgment of the court of appeals entered on September 1, 1999 is invoked under 28 U.S.C. § 1254(1) (1994). This petition is timely filed within 90 days of the October 14, 1999 denial of rehearing of that judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires the Court to determine whether a Chicago Ordinance, Section 5.17 of Title 17 of the Municipal Code of Chicago ("the Ordinance" or the "Chicago Ordinance"), is preempted by the Federal Cigarette Labeling and Advertising Act (the "FCLAA"), 15 U.S.C. § 1331, *et seq.* (1994).

The Ordinance is set forth in the Appendix to this petition at 37a-40a.

Section 5 of the FCLAA provides:

> "(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

15 U.S.C. § 1334 (1994).

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides in relevant part that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

This case presents this Court with a conflict between rulings of the Second, Fourth, Seventh and Ninth Circuits concerning the application of the preemption provision of the Federal Cigarette Labeling and Advertising Act. In this case, Petitioners challenged, on federal preemption grounds, a Chicago Ordinance that virtually eliminates the outdoor advertising of cigarettes throughout the City. The United States Court of Appeals for the Seventh Circuit allowed the ordinance to stand, with the exception of a provision entitling retailers to post "generic" advertisements for cigarettes, which was held to be preempted. The Seventh Circuit's hold-

ing was consistent with a previous ruling of the Fourth Circuit, *Penn Advertising, Inc.* v. *Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), and a subsequent decision of the Second Circuit, *Greater New York Metropolitan Food Council, Inc.* v. *Giuliani*, 195 F.3d 100 (2d Cir. 1999), both of which upheld similar ordinances against preemption challenges for essentially similar reasons. Approximately two and a half months after the Seventh Circuit held the Chicago Ordinance not to be preempted, the United States Court of Appeals for the Ninth Circuit held a virtually identical Resolution, imposed in the State of Washington by the Tacoma-Pierce County Health Department Board of Health, to be preempted in its entirety by Section 1334(b) of the FCLAA. Copies of each of the four decisions are appended to this Petition. (App. 1a-13a, 41a-60a, 61a-74a, and 75a-93a) As a result of these conflicting rulings, the ability to display advertising and promotion of tobacco products on retail premises now varies widely from state to state, and depends entirely on the geographical location of the advertiser.

The Challenged Law

On September 10, 1997, the City of Chicago adopted an amendment to its municipal code essentially banning all publicly visible advertising of cigarettes and alcoholic beverages throughout the city. (App. 37a-40a) The Ordinance provides, with certain narrow exceptions, that:

> "No person may place any sign, poster, placard or graphic display that advertises cigarettes . . . in a publicly visible location. In this section, 'publicly visible location' includes outdoor billboards, sides of buildings, and freestanding signboards."

(App. 39a)

History of the Litigation

(a) The District Court Proceedings

Petitioner FAIR is a not-for-profit corporation consisting of several outdoor advertising companies impacted by the Chicago Ordinance. FAIR filed a § 1983 civil rights action against the City of Chicago ("the City" or "Chicago") challenging the validity of the Chicago Ordinance in the United States District Court for the Northern District of Illinois prior to the local law's effective date on October 30, 1997. The lawsuit was premised upon preemption, First Amendment and Contracts Clause grounds and sought declaratory and injunctive relief, as well as damages and attorneys' fees. Jurisdiction of the district court existed pursuant to 28 U.S.C. §§ 1331 and 1343 (1994).[1]

Following an expedited and extensive discovery schedule, on July 29, 1998, the district court granted FAIR's Motion for Summary Judgment, finding that the Chicago Ordinance was preempted, in its entirety, by Section 1334(b) of the FCLAA. The court permanently enjoined the City and its agents from enforcing the Ordinance.

In defense of the Ordinance, Chicago advanced two primary arguments: (1) that the Ordinance was not "based on smoking and health" because its articulated purpose was to prevent and protect minors from engaging in illegal purchases of cigarettes and was therefore not health-related, and (2) that the Ordinance was not "with respect to the advertising and promotion of any cigarettes" because, like a similar Baltimore

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[1] The 1998 settlement agreement between the major cigarette manufacturers and the states, including Illinois, does not affect Petitioner's case. While the settlement agreement does include some consented-to advertising restrictions, it continues to permit advertising that Chicago Ordinance would eliminate—specifically, indoor and outdoor advertising displayed on the premises of retail establishments that sell tobacco products. Furthermore, the agreements apply only to their private signatories, which do not include Petitioner's members.

ordinance that had survived a preemption challenge in the Fourth Circuit (*see Penn Advertising, supra*), the Ordinance supposedly restricted only the location of cigarette advertisements, rather than their content. The district court rejected both arguments. (App.21a-30a)

The district court first rejected the City's claim that the Ordinance was not related to health concerns simply because its stated purpose was to prevent and protect minors from engaging in illegal purchases of cigarettes. Noting that the Illinois laws aimed at illegal sales of cigarettes to minors were themselves based on smoking and health concerns and relying upon this Court's decision in *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) for the proposition that courts are not bound by the articulated purpose of an ordinance for preemption purposes, but must rather consider both its actual purpose and effect, the district court concluded that the Ordinance's prohibitions were "unquestionably based upon smoking and health." (App. 29a-30a, n.8)

The district court also rejected the City's second argument against preemption, the so-called "content/location distinction," which the court found to be "based on a false dichotomy that is not found in the Preemption Statute itself." (App. 23a) Rejecting explicitly the Fourth Circuit's reasoning in *Penn Advertising, supra*, the court reasoned that "the very nature and origin of Chicago's Ordinance bring it squarely within the literal coverage of the Preemption Statute, leaving no room for a reading that deviates from that coverage" (App. 22a):

> "To be sure, a 'requirement . . . with respect to the advertising or promotion of . . . cigarettes' may well consist of a regulation of advertising *content* (for example, the same kind of state-dictated or locally-dictated delivery of information that was the sole subject of the original 1965 version of the Preemption Statute, or that was the subject of the ordinance at issue in *Vango Media*). But, by contrast, a 'prohibition . . . with

> respect to advertising . . . of cigarettes' denotes a flat-out *bar* of such advertising—and if such a bar in terms of location is indeed 'based on smoking and health,' it is still specifically forbidden by the express terms of the Preemption Statute."

(App. 22a-23a) The district court concluded that the Ordinance was preempted in its entirety. In light of its preemption ruling, the court found it unnecessary to reach Petitioner's additional arguments. (App. 33a, n.9)

(b) The Ruling of the Court of Appeals

On September 1, 1999, the United States Court of Appeals for the Seventh Circuit reversed the district court's decision as it applied to the bulk of the Ordinance, affirming the decision only insofar as it pertained to one of the Ordinance's exceptions. (App. 1a-13a) The court of appeals recognized that under the plain language of Section 1334(b) all of the Chicago Ordinance would fall within the preemptive scope delineated by Congress. The court did not deny that that the Ordinance was "a requirement or prohibition," or that it was "based on smoking and health," or that, on its face, it was "with respect to the advertising or promotion . . . of cigarettes." But the court nevertheless refused to read Section 1334(b) that way, cautioning against an "overly literal" interpretation of Section 1334(b) that would "read the presumption against pre-emption out of law whenever Congress speaks to the matter with generality." (App. 7a, quoting *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)) Instead, it dismissed the express language used by Congress—language which this Court described in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), as "provid[ing] a 'reliable indicium of congressional intent with respect to state authority," *id.* at 517—as being so "expansive" and "unhelpful" that it provided no aid to the court in determining Congress' intent. (App. 5a-7a) Rather than give effect to the language of Section 1334(b),

the Seventh Circuit concluded that it had to "go beyond the unhelpful text" to determine its meaning and found in the policy stated in Section 1331 of the FCLAA—to avoid "diverse, nonuniform and confusing advertising standards"[2]—a basis for concluding that "mere" location restrictions on cigarette advertising do not create the kind of "diverse, nonuniform and confusing" advertising regulations Congress sought to avoid. (App. 5a-13a) Applying the same anti-textual content/location distinction that had been applied by the Fourth Circuit in *Penn Advertising* (App. 70a-71a) (and was applied by the Second Circuit less than two months later in *Greater New York Metropolitan Food Council* (App. 56a-57a)) in holding similar legislation not to be preempted, the Seventh Circuit held that the bulk of the ordinance was not preempted because it was "merely" a "land use provision" and because it restricted the location and not the content of tobacco product advertising.[3] (App. 10a-12a)

FAIR filed a Petition for Rehearing *En Banc*, which was denied on October 14, 1999. (App. 35a-36a) Approximately one month later, the Court of Appeals for the Ninth Circuit in *Lindsey* v. *Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999), held a virtually identical scheme designed to limit tobacco advertising in Tacoma, Washington to be preempted for many of the very reasons relied upon by the district court in this case and rejected by the Seventh Circuit. (App.75a-93a) The Ninth Circuit was aware of, and explicitly rejected, the reasoning of the Seventh Circuit. (App. 86a-89a)

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[2] 15 U.S.C. § 1331 (1994).

[3] The court held that paragraph 3 of the Ordinance, which permitted cigarette advertisements containing generic advertising content throughout the City was preempted on the ground that it was a content-based limitation on cigarette advertising. (App. 12a-13a)

REASONS FOR GRANTING THE WRIT

I

The Seventh Circuit's Decision In This Case Results In A Circuit Split That Directly Undermines Congress' Intent In Passing The FCLAA

The Seventh Circuit's opinion in this case directly conflicts with a ruling of the Ninth Circuit in a nearly identical case, *Lindsey* v. *Tacoma-Pierce County Health Department*.[4] (App. 75a-93a) In *Lindsey*, the Ninth Circuit struck down a Resolution of the Tacoma-Pierce County Health Department (the "Resolution"), effectively banning outdoor tobacco advertising in Pierce County, Washington, on the ground that it was preempted by Section 1334(b). The Resolution in *Lindsey*, like the Chicago Ordinance, essentially banned all cigarette advertisements in publicly visible locations throughout the county, with only a few exceptions. (App. 77a-79a) Unlike the Seventh, Second, and Fourth Circuits, the Ninth Circuit held the legislation before it preempted in its entirety under Section 1334(b).[5]

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[4] The *Lindsey* court, like the Seventh Circuit in this case and the Second Circuit in *Greater New York Metropolitan Food Council*, reversed the district court's decision below. *See Lindsey* v. *Tacoma-Pierce County Health Department*, 8 F. Supp. 2d 1213 (W.D. Wash. 1997) (holding that no part of Resolution essentially banning outdoor advertising of cigarettes was preempted by the FCLAA), *reversed by Lindsey*, 195 F.3d 1065 (9th Cir. 1999); *Greater New York Metropolitan Food Council, Inc.* v. *Giuliani*, No. 98 Civ. 251 (DAB), 1998 WL 879721 (S.D.N.Y. Dec. 16, 1998) (holding that ordinance restricting outdoor tobacco product advertising was preempted by FCLAA in its entirety), *reversed by Greater New York Metropolitan Food Council*, 195 F.3d 100 (2d Cir. 1999). This diversity of opinions on the meaning of Section 1334(b) illustrates the extent of the confusion surrounding this important issue. *See also Rockwood* v. *City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding ban of outdoor advertising of cigarettes to be preempted).

[5] On December 28, 1999, the Ninth Circuit ordered the parties to file simultaneous briefs setting forth their respective positions on whether

The Board of Health in *Lindsey*, like Chicago here, did not contend that the plain language of the FCLAA failed to preempt its ban on outdoor tobacco advertisements. (App. 84a) Rather, the Board, like the City here, sought (in the language of the Ninth Circuit) "to evade the express language of the FCLAA's preemption provision" by "arguing that the FCLAA does not preempt its resolution because the FCLAA only preempts local laws that regulate the content rather than the location of cigarette advertisements." *Id.* The Ninth Circuit, relying on this Court's decision in *Cipollone*, dismissed this argument, explicitly rejecting the decisions of the Seventh, Second, and Fourth Circuits and finding instead that the content/location distinction set forth in those cases "ignores the history, purpose, and language of the FCLAA and is not supported by Supreme Court precedent." *Id.*

The Ninth Circuit looked first to the plain language of Section 1334(b), concluding that the resolution was "preempted by the clear and express language" as a (1) requirement or prohibition, (2) based on smoking and health, (3) with respect to the advertising or promotion of cigarettes. The Resolution, the court concluded was (1) a local law, (2) pertaining to health matters related to cigarette smoking, that (3) expressly prohibited outdoor tobacco advertisements and regulated point of sale information. (App. 83a-84a)

The *Lindsey* court then examined—and rejected as "not supported by the plurality decision in *Cipollone*" (App. 86a)—the efforts of the Fourth, Second and Seventh Circuits to exalt what they perceived to be the "purpose" of Section 1334(b) over the plain language of the statute. Noting that both the Seventh and Second Circuits "[r]ecogniz[ed] that the

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the *Lindsey* case should be reheard *en banc*. In fact, the Tacoma-Pierce Health Department has determined not to appeal the ruling of the Ninth Circuit. *See Seattle Times*, Dec.5, 1999, at B3. This Court will have the opportunity to resolve the circuit split only by granting review in this case and/or the *Greater New York Metropolitan Food Council* case from the Second Circuit, as to which a petition for a writ of *certiorari* is being filed contemporaneously.

text of the FCLAA preemption provision does not support the artificial distinction between content and location restrictions," the Ninth Circuit criticized the decisions of its sister circuits for erroneously "turn[ing] to the Congressional purpose behind the FCLAA for support" for this distinction and for misconstruing that purpose by incorrectly concluding that location restrictions "do not lead to the 'diverse, nonuniform, and confusing' advertising standards that Congress aimed to prevent by promulgating the FCLAA preemption statute." (App. 86a-87a) The court concluded that:

> "The distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 1334(b) supports the preemption of a ban on outdoor tobacco advertising. . . . [T]he failure to preempt location restrictions on tobacco advertising will place an unjustifiable burden upon a tobacco advertiser to consult local regulations concerning the placement of tobacco advertisements in every locality in which it wishes to advertise. The bans on outdoor advertising in *FAIR*, *Giuliani*, and this case present a good example of the multitude of different regulations tobacco advertisers face. . . . [As a result of these separate advertising regulations], a tobacco advertiser is faced with diverse and nonuniform tobacco advertising regulations depending solely upon the politics of the locality of the advertising. This is precisely the result Congress was trying to avoid in promulgating Section 1334(b)."

(App. 87a-88a) (internal citations omitted)

The Ninth Circuit further concluded that the history of Section 1334(b) did not support the content/location distinction of the Seventh and Second Circuits, noting that the distinction was inconsistent with this Court's interpretation of the 1969 amendments in *Cipollone* as broadening the scope of preemption *beyond* state laws that only regulated the "content" of tobacco advertisements. (App. 89a-90a) The court

noted that the 1965 preemption provision of the FCLAA provided that, "[n]o *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes." (App. 89a, quoting 15 U.S.C. § 1334(b) (1964 & Supp. I 1965)) (emphasis in original), and that this provision was amended in 1969 to its present form. Quoting *Cipollone*, the Ninth Circuit pointed out that the language of the current preemption provision is "much broader" than the 1965 version in at least two ways:

> "First, the later Act bars not simply 'statement[s],' but rather 'requirement[s] or prohibition[s] imposed under State law.' Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes."

(App. 89a, quoting *Cipollone*, 505 U.S. at 520) See also *Medtronic Inc.* v. *Lohr*, 518 U.S. 470 (1996) 518 U.S. at 488 n.9 (noting that "the statute in *Cipollone* was clearly intended to have a broader preemptive effect than its 1965 predecessor"). The court held that "[t]o give effect to the 1969 amendments, the distinction between content regulations and location regulations cannot . . . be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements." (App. 90a)

Finally, the *Lindsey* court held that the structure of the FCLAA itself, when viewed as a whole, militated against the content/location distinction upheld by the other courts of appeal. Specifically, the court noted that the FCLAA's other preemption provision, which provides that "[n]o statement relating to smoking and health . . . shall be required on any cigarette package," 15 U.S.C. § 1334(a), stands in sharp contrast to Section 1334(b) in that, unlike Section 1334(b), it is directed only at specific "statements" relating to smoking and health. As the Ninth Circuit noted, "[i]n order to distinguish between the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read

as preempting more than just content regulations." (App. 90a) To accept the content/location distinction, the court noted, would be "to give 'requirement or prohibition' in subsection (b) essentially the same meaning as 'statement' in subsection (a), thereby ignoring the basic principle of statutory construction that different words in the same statute must be given different meanings." (App. 90a)

There is thus a direct conflict between the preemption rulings that now govern in the 11 states within the three circuits that have held legislation such as the Chicago Ordinance not to be preempted and in the 9 states within the Ninth Circuit that has held such legislation to be preempted. The split amongst the circuits on this important issue should now be resolved.[6]

II

The Seventh Circuit's Decision In This Case Conflicts Directly With This Court's Opinion In *Cipollone*

The Seventh Circuit's opinion is not only in conflict with the Ninth Circuit's decision in *Lindsey*, but is also in direct conflict with *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504

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[6] The circuit split on the meaning of Section 1334(b) also warrants review by this Court because the very fact of the split undermines the very Congressional purpose behind the FCLAA of preventing "diverse, nonuniform, and confusing" cigarette "advertising regulations" and of protecting "commerce and the national economy" to "the maximum extent consistent with" the policy of informing the public about the health risks of smoking. *See* 15 U.S.C. § 1331(2) (1994). State and local tobacco advertising regulations, such as those challenged in *Penn Advertising*, *Greater New York Metropolitan Food Council*, *Lindsey*, and this case, have been passed in cities throughout the country, each setting different restrictions on tobacco products advertising. These regulations impose a significant burden on tobacco advertisers, such as Petitioner's members, who must on their own, figure out local, state and national advertising regulations. This is the very "diverse, nonuniform and confusing" result Congress sought to avoid by passing the FCLAA.

(1992), the only case in which this Court has directly addressed the meaning of Section 1334(b). In *Cipollone*, a divided Court held that Section 1334(b) preempted certain common law claims against cigarette manufacturers, but did not preempt other such claims. *Id.* at 520-530.[7] The Seventh Circuit's approach to interpreting Section 1334(b) ignores those aspects highlighted by this Court in *Cipollone* as most important—specifically, the plain language of the statute and the 1969 amendments broadening its preemptive scope.

A majority of the Court in *Cipollone* concluded that "the preemptive scope of [Section 1334(b)] is governed entirely by the express language of [Section 1334(b)]." *Cipollone*, 505 U.S. at 517 (plurality opinion); *id.* at 531-32 (Blackmun, J., concurring in part and dissenting in part) (agreeing with plurality that express language of Section 1334(b) is determinative). Finding that Section 1334(b) "provide[d] a 'reliable indicium of congressional intent with respect to state authority,' " a majority of the Court also explicitly rejected the lower courts' implied preemption analysis, which the Court faulted for looking beyond the text of the statute. *Id.* at 517 (plurality opinion); *id.* at 531-32 (Blackmun, J., concurring in part and dissenting in part). Finally, and most notably, the *Cipollone* Court unanimously agreed that the plain meaning of Section 1334(b) was of primary importance in interpreting the preemptive scope of the FCLAA. *See* 505 U.S. at 521-22 (" 'We must give effect to this plain language [of Section 1334(b)] unless there is good reason to believe Congress intended the language to have some more restrictive meaning.' In this case there is no 'good reason to believe' that Congress meant less than what it said.") (internal citation omitted); *id.* at 532 ("[A]n interpreting court must 'begin with

[7] The plurality opinion was written by Justice Stevens and joined by Chief Justice Rehnquist and Justices White and O'Connor. Justice Blackmun's opinion, joined by Justices Kennedy and Souter, concluded that none of petitioners' claims were preempted by the FCLAA. Justice Scalia's opinion, joined by Justice Thomas, concluded that all of petitioners' claims were preempted by the FCLAA.

the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' ") (Blackmun, J., concurring in part and dissenting in part) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)); *id.* at 544 ("[O]ur job is to interpret Congress's decrees of preemption neither narrowly nor broadly, but in accordance with their apparent meaning.") (Scalia, J., concurring in part and dissenting in part).

As the *Lindsey* court noted, the Seventh Circuit's opinion simply refuses to take the plain language of Section 1334(b) seriously, as required by *Cipollone*.[8] (App. 86a-89a) The Seventh Circuit's concerns about the dangers of adopting an "uncritical literalism" in reading Section 1334(b) stand in stark contrast to this Court's repeated assertion that the plain language of Section 1334(b) is controlling. Focusing not only on the "with respect to" language of § 1334(b), but on the entire provision as a whole, this Court made clear in *Medtronic*, 518 U.S. 470, that the text of Section 1334(b) is hardly as unboundedly expansive as the Seventh Circuit suggests, but is rather "targeted at a limited set of state requirements—those 'based on smoking and health'—and then only at a limited subset of the possible applications of those requirements—those involving the 'advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of' the federal statute." *Id.* at 488. *See also Cipollone*, 505 U.S. at 517, 521-22 (noting the clarity of the language of Section 1334(b)). The refusal of the Seventh Circuit to give effect to the plain meaning of Sec-

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[8] The same is true of both the Second Circuit's decision in *Greater New York Metropolitan Food Council* and the Fourth Circuit's decision in *Penn Advertising*, both of which upheld similar tobacco advertising ordinances (except for a tombstone provision in the ordinance at issue in *Greater New York Metropolitan Food Council*) against a preemption challenge on the basis of the content/location distinction. *Greater New York Metropolitan Food Council*, 195 F.3d at 107-110; *Penn Advertising*, 63 F.3d at 1324.

tion 1334(b) is thus in stark contrast to this Court's jurisprudence.

Moreover, the ERISA case cited by the Seventh Circuit (App. 5a-7a) in support of its reading of Section 1334(b), *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645 (1995), simply does not support the Seventh Circuit's approach. This Court's preemption jurisprudence makes clear that the language of ERISA is simply too different from that of the FCLAA to permit interpretation of the former to dictate that of the latter. *Compare Travelers Insurance Co.*, 514 U.S. at 656 (ERISA text described as "unhelpful") with *Cipollone*, 505 U.S. at 517 (FCLAA text described as clear). *See also Medtronic*, 518 U.S. at 488 (holding out Section 1334(b) as reasonable in scope and contrasting it with 21 U.S.C. § 360k(a), the broad preemption provision at issue in that case).

The Seventh Circuit's treatment of the legislative history of Section 1334(b) also runs counter to this Court's examination of that legislative history in *Cipollone*. Specifically, the Seventh Circuit's opinion fails to appreciate the significance of the central element of the legislative history of Section 1334(b) identified by this Court in *Cipollone*, namely, that the 1965 version of the statute—which was narrow and specifically targeted advertising content —was amended in 1969 to broaden significantly the preemptive scope of the statute. If, as the Seventh Circuit suggests, Congress was merely concerned with ensuring uniform regulation of cigarette advertising content, the adoption in 1969 of a "much broader" preemption provision (as this Court described it in *Cipollone*) would hardly have been necessary. *See* pp. 10-11 above.

Finally, the content/location distinction of the court of appeals runs directly counter to this Court's recognition in *Cipollone* that a ban on advertising in particular media is precisely the kind of "diverse, nonuniform, and confusing" regulation that Congress sought to end when amending Sec-

tion 1334(b) in 1969. *See Cipollone*, 505 U.S. at 515 n.11 (citing a California state ban on print and electronic cigarette advertisements as the type of diverse, non-uniform and confusing cigarette advertising regulation that prompted the broadening of Section 1334(b) in 1969). Even the Justices in *Cipollone* who viewed the 1969 Amendments to Section 1334(b) as "nonsubstantive in nature" (and who narrowly interpreted Section 1334(b)) acknowledged that, by adding the word "prohibition," Congress sought to "ensure that a State could not do through negative mandate (*e.g., banning all cigarette advertising*) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements). . . ." *Cipollone*, 505 U.S. at 539 (Blackmun, J., concurring in part and dissenting in part) (emphasis added). This is precisely what the Chicago Ordinance tries to do through its draconian "location" restrictions.

In short, entirely apart from the direct circuit split that this case raises, the Seventh Circuit's opinion in this case ignores this Court's analysis in *Cipollone* to reach a result that Congress never intended. The case is well worthy of review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Dated: New York, New York
January 12, 2000

Respectfully submitted,

FLOYD ABRAMS
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Of Counsel:

JONATHAN R. DONNELLAN
JOEL KURTZBERG
MATTHEW A. LEISH
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

PAUL M. LEVY
PHILLIP J. ZISOOK
BRIAN D. SAUCIER
DEUTSCH, LEVY & ENGEL, CHARTERED
225 W. Washington Street, Suite 1700
Chicago, Illinois 60606
(312) 346-1460

Attorneys for Petitioner

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-3191, 99-1115 & 99-1516

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, THE CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 7619—Milton I. Shadur, *Judge*.

ARGUED JUNE 10, 1999—DECIDED SEPTEMBER 1, 1999

Before HARLINGTON WOOD, JR., RIPPLE and MANION, *Circuit Judges*.

RIPPLE, *Circuit Judge*. The Federation of Advertising Industry Representatives ("the Federation") brought this action seeking declaratory and injunctive relief against a City of Chicago ordinance that restricts public advertisement of cigarette and alcohol products ("the Ordinance"). In its complaint, the Federation submitted that the Ordinance violated the First Amendment, the Contracts Clause and the Due Process Clause of the Constitution of the United States. It also alleged that the Ordinance was preempted by the Federal Cigarette Labeling and Advertising Act ("the FCLAA" or "the Act") and by state law. The district court held that the Ordinance is preempted by the FCLAA. For the reasons stated in this opinion, we affirm in part and reverse in part the judgment of the district court and remand for further proceedings consistent with this opinion.

I

BACKGROUND

Chicago adopted an ordinance restricting public advertisement of cigarette products and alcohol. The Ordinance essentially bans all publicly visible advertising of such products, and then carves out certain exceptions. For example, the Ordinance exempts signs located near highways, in certain commercial and manufacturing zoning areas, at certain sports facilities and inside stores licensed to sell alcohol and cigarette products. The Ordinance permits signs on commercial vehicles transporting such products, and signs identifying the premises where such products are sold.[1]

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[1] The text of the Ordinance states:

> (a) No person may place any sign, poster, placard or graphic display that advertises cigarettes or alcoholic beverages in a publicly visible location. In this section, "publicly visible location" includes outdoor billboards, sides of buildings, and free-standing signboards. This section shall not apply to:

(footnote continued)

The Federation submits that the Ordinance is preempted by § 5(b) of the FCLAA:

---

1. (A) With respect to cigarettes, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-64 of this code; or (B) With respect to alcoholic beverages, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-60 of this code; or (C) On commercial vehicles used for transporting cigarettes or alcoholic beverages;

2. (A) With respect to cigarettes, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-64 of this code that has been placed for the purpose of identifying such premises; or (B) With respect to alcoholic beverages, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-60 of this code that has been placed for the purpose of identifying such premises;

3. Any sign that contains a generic description of cigarettes or alcoholic beverages;

4. (A) With respect to cigarettes, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-64 of this code that is provided as part of a promotion of a particular brand of cigarettes; or (B) With respect to alcoholic beverages, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-60 of this code that is provided as part of a promotion of a particular brand of alcoholic beverage;

5. Any sign at a special event, as that term is defined in section 10-8-335 of this code;

6. Any sign on a CTA vehicle;

7. Any sign on property owned, leased or operated by the Illinois Sports Facilities Authority;

8. Any sign at Comiskey Park, Soldier Field, the United Center, or Wrigley Field;

9. Any sign on property adjacent to an interstate highway; or

10. Any sign located in a C3 District (Commercial-Manufacturing), a C4 District (Motor Freight Terminal), or any M District (Manufacturing).

(footnote continued)

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

Congress enacted the initial version of the FCLAA in 1965. That version required conspicuous labels warning of smoking's health risks on every package of cigarettes sold in the United States. The original preemption provision of the Act stated:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334 (1965). The current version of § 5(b) was adopted in 1969. Congress then made substantial revisions to the FCLAA. In addition to amending the preemption provision, the 1969 Amendment strengthened the required warning label and banned cigarette advertising in any electronic medium subject to regulation by the Federal Communications Commission.

The district court held that the plain language of § 5(b) of the 1969 Act applied to preempt the Ordinance's cigarette advertising restrictions. *See Federation of Adver. Indus. Representatives v. City of Chicago*, 12 F. Supp.2d 844, 848 (N.D. Ill. 1998). The court also held that the regulation of alcohol advertising was not severable from the preempted regulation of cigarette advertising.

(b) This section shall not be construed to permit any display that is otherwise restricted or prohibited by law.

(c) The penalty for violation of this section shall be as set forth in section 11.13 of this Title.

R.1, Ex.A.

II

DISCUSSION

A.

Our interpretation of § 5(b) must begin with the Supreme Court's interpretation of that provision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). In *Cipollone*, the Court set out a general framework for addressing preemption involving § 5(b). Although a majority of the Court did not join all aspects of the lead opinion, a majority of the Court did agree that, in analyzing a preemption issue, we must " 'start[ ] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' Accordingly, '[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." *Id.* at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (internal quotation marks omitted)). In Cipollone, the Court applied these principles in determining whether various common law claims against cigarette manufacturers had been preempted by the federal Act. Here, we are confronted with a different issue. We must determine whether the language applying preemption to those state laws that regulate "with respect to advertising and promotion" preempts the Ordinance. The holding of the Court in *Cipollone* does not, of course, resolve this precise issue. The Court's analysis, however, does provide valuable insight.

The 1969 Amendment broadened the scope of the FCLAA's preemption and, in certain cases, the broader language indicates greater preemption under the 1969 Act than under the 1965 Act. *See Cipollone*, 505 U.S. at 520. Nevertheless, as a unanimous Supreme Court has cautioned in a similar preemption context, *see New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S.

645, 656 (1995), we must be careful not to adopt an "uncritical literalism" in approaching this difficult issue. Instead, we must follow the instruction of the Supreme Court that "any understanding of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.' " *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (quoting *Cipollone*, 505 U.S. at 530 n.27) (emphasis in original).[2] In *Travelers Insurance*, the Court considered § 514 of the Employee Retirement Income Security Act ("ERISA"). A unanimous opinion of the Court stated:

> The governing text of ERISA is clearly expansive. Section 514(a) marks for pre-emption "all state laws insofar as they . . . relate to any employee benefit plan" covered by ERISA, and one might be excused for wondering, at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," H. James, Roderick Hudson xli (New York ed., World's Classics 1960). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. . . . We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

Travelers Ins., 514 U.S. at 655-56.

The limiting language of the FCLAA at issue here ("with respect to advertising and promotion") is similar in its breadth

---

[2] Although the lead opinion in *Medtronic* did not carry a majority of the Court, a majority of the Court did agree with the general principles at issue here.

to the language of ERISA § 514 ("relate to any employee benefits plan"). *See Vango Media, Inc. v. City of New York*, 34 F.3d 68, 74 (2d Cir. 1994). Despite the obvious difference in the statutes, the methodology set out in *Travelers Insurance* is helpful in interpreting the language of the FCLAA at issue here. If the FCLAA language ("with respect to advertising and promotion") were viewed with an "uncritical literalism," the effect would be to "read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Travelers Ins.*, 514 U.S. at 656.

Following the Supreme Court's mandate in *Travelers Insurance* and in *Medtronic*, we must examine the congressional scheme and legislative history of § 5(b) in order to determine what Congress meant by this broad language. *See id.* (interpreting "relate to" under ERISA § 514 in accordance with the congressional goal of uniformity under ERISA); *Medtronic*, 518 U.S. at 484-85. In *Cipollone*, the Court stated that "the pre-preemptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." 505 U.S. at 517. Notably, however, every opinion in *Cipollone* nevertheless relied on legislative history, historical context, legislative purpose, or analysis of the statutory provisions as a whole in interpreting the scope of the pre-emption mandated by the language of § 5(b) of the 1969 Act. *See id.* at 513-15, 519-20, 529 (plurality opinion); *id.* at 534-35, 539-42 (Blackmun, J., concurring in part and dissenting in part); id. at 553 (Scalia, J., concurring in part and dissenting in part). Indeed, in *Medtronic*, a majority of the Court took pains to clarify what it meant in *Cipollone*:

> As in *Cipollone*, we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of [the statute at issue in *Medtronic*] means that we need not go beyond that language to determine whether Congress intended the [statute] to pre-empt at least some state law, we must nonetheless "identify the domain expressly pre-empted"

> by that language. Although our analysis of the scope of the pre-emption statute must begin with its text, our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption.

Medtronic, 518 U.S. at 484-85 (quoting *Cipollone*, 505 U.S. at 517) (citations omitted). The Court went on to discuss those two presumptions. First, it noted that, "because the States are independent sovereigns in our federal system," there has long been a presumption that "Congress does not cavalierly pre-empt state-law causes of action." *Id.* at 485. This presumption, remarked the Court, is especially applicable when Congress legislates in areas traditionally occupied by the historic police powers of the state. Second, continued the Court, in determining whether Congress has preempted such activity, the purpose of Congress must, in every case, be "the ultimate touchstone." *Id.* (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). That intent is discerned, continued the Court, from the language of the Act, the statutory framework and the structure and purpose of the Act as a whole. *See id.* at 486. In light of the Supreme Court's clear mandate, we cannot limit our analysis solely to the language of § 5(b). Indeed, the only other circuit to confront whether the FCLAA preempts a similar ordinance has heeded the Supreme Court's words and adopted the methodology set forth in the Court's opinions. *See Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1030 (1996), *readopted*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

Any other approach leads to results that we cannot believe Congress intended.[3] We cannot imagine that Congress

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[3] We need not hypothesize such results; adherence to a more rigid approach already has produced them. One court has held that the FCLAA prevents states and municipalities from restricting both advertisements of cigarettes near schools and distributions of free cigarette samples. *See Rockwood v. City of Burlington*, 21 F. Supp.2d 411, 420 (D. Vt. 1998).

intended the states to be without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard. However, failure to remember that Congress was concerned about the states' capacity to utilize their traditional police powers on matters that do not tread on federal interests inevitably will lead to such results. We can expect Congress to be far more explicit if it intends to dilute this residual authority of the states.

When we examine the FCLAA in light of congressional goals, we encounter two important manifestations of congressional intent that shed light on the scope of § 5(b) preemption in this case. The first does not require that we leave the text of the statute. Congress set forth, in the statutory text, an express statement of the purpose of the FCLAA and its preemptive provisions:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) *not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.*

15 U.S.C. § 1331 (emphasis added). Moreover, the legislative history confirms that the preemption provision was adopted "to avoid the chaos created by multiplicity of conflicting regulations." S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663.

The second indication of the congressional intent confirms the message of this statutory text by indicating that Congress, in enacting the statute, was aware of the presumption against preemption and concerned about preserving areas of traditional local concern. The Senate Report refers to § 5(b) as "narrowly phrased" and not intended to touch state authority over sales to minors, taxation, indoor smoking, or "similar police regulations." S. Rep. No. 566, 91st Cong., 2d Sess. (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. We therefore must read the language of the FCLAA preemption provision in light of Congress' desire not only to ensure uniformity of regulation with respect to matters of labeling and advertising, but also in light of the manifest congressional concern in preserving for the states the remainder of their traditional police powers.

B.

We turn then to the Ordinance to determine whether it is the type of police power regulation of local concern that Congress intended to preserve. *See* S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663. When the Ordinance is read in its entirety, it is clear that its thrust is the restriction of public advertisement of cigarettes (and alcohol products) in various locations. The Ordinance bans all public advertisement of such products, but then exempts certain sign types in certain locations. The Ordinance exempts signs located near highways, signs in certain commercial and manufacturing zoning areas, signs at certain sports facilities, signs inside a store that is licensed to sell alcohol and cigarette products, signs on commercial vehicles transporting such products, and signs identifying the premises upon which such products are sold.

Land-use and zoning issues have " 'always been an intensely local area of the law.' " *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 67 (4th Cir. 1992) (quoting Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L.

Rev. 837, 839 (1983)) (tracing the history of land-use and zoning regulations in the United States); *see also River Park, Inc. v. City of Highland Park*, 28 F.3d 164, 165, 167 (7th Cir. 1994); *Muckway v. Craft*, 789 F.2d 517, 523 (7th Cir. 1986). More specifically, it has been established for quite some time that zoning restrictions on the sizes and placement of outdoor advertisements are well within the police power of states and municipalities.[4] *See St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 274-76 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 529-31 (1917). Indeed, the Supreme Court has held that a Utah statute banning the outdoor advertisement of cigarettes is within that power. *See Packer Corp. v. Utah*, 285 U.S. 105, 108-10 (1932). The placement and manner of outdoor advertising is a matter of traditional local concern. Although Congress could choose to preempt such police regulations, it has indicated that it does not wish to do so under the FCLAA. *See Penn Advertising*, 63 F.3d at 1324; S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663. In short, considering Congress' express intent to preserve traditional areas of local concern not implicated by its desire for uniformity in advertising and labeling, we ought not imply, especially in light of the presumption against preemption, such an abrogation of a regulation of local interest and importance.

Our conclusion that this Ordinance is within the traditional local police power that Congress wished to preserve cannot end our inquiry. We still must examine the effect of the Ordinance on the federal interest in uniformity of labeling and advertising regulations. This inquiry requires that we focus on the precise sort of regulation that the Ordinance requires and determine whether compliance with the Ordinance will frustrate or burden the purpose of the federal statute. The

---

[4] This authority is subject, of course, to the First Amendment protection of such signs. *See generally 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). We express no opinion with respect to the First Amendment challenge to the Ordinance, which the district court must address on remand.

Ordinance basically is a land-use regulation; it regulates the location and type of signs. In that respect, it creates no danger of interfering with the FCLAA's advertising and labeling requirements. *See Penn Advertising*, 63 F.3d at 1324.[5]

We do believe, however, that one aspect of the Ordinance is problematic in this regard. In addition to its many provisions regulating land-use, the Ordinance also purports to regulate the content of some advertising without regard to any land-use consideration. Specifically, the Ordinance permits advertising, without any location consideration, that is limited to a generic, as opposed to brand-specific, mention of a tobacco product. In our view, this provision, unlike the rest of the Ordinance, runs squarely into the prohibition of the current § 5(b), a provision that, we must remember, is substantially broader than its predecessor, which dealt solely with the specific labeling requirements.

Although we find this one aspect of the Ordinance to be preempted by federal law, we think it is clear that this aspect is severable from the rest of the Ordinance. We think it is clear that the City Council, intending to enact a broad land-use provision, would not have regarded the problematic provision as a necessary component of its handiwork. The Supreme Court of Illinois has recently noted, in considering a severability issue, that the courts have an "obligation to uphold legislative enactments whenever reasonably possible."

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[5] In this respect, the Ordinance here marks a sharp contrast with the ordinance in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). In *Vango Media*, the court considered whether an Ordinance requiring a minimum of one public health message for every four cigarette advertisements on city-licensed facilities was preempted by the FCLAA. The court held that the regulation was "with respect to advertising and promotion of cigarettes," and therefore preempted. In reaching this conclusion, the court noted that the regulation would create the nonuniformity that Congress feared. *See id.* at 74. There, unlike here, the local law would require that certain anti-smoking messages be carried in cigarette advertisements, thereby directly conflicting with the advertisement message requirements contained in the FCLAA and creating nonuniformity with those provisions.

People v. Sanders, 696 N.E.2d 1144, 1149 (Ill. 1998). That court has explained the test for severability:

> [T]his court has long held that the test of severability is whether the valid and invalid provisions of the Act are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently . . . .

Cincinnati Ins. Co. v. Chapman, 691 N.E.2d 374, 382 (Ill. 1998) (quoting *Fiorito v. Jones*, 236 N.E.2d 698 (Ill. 1968)) (internal quotation marks omitted). We believe that it is "reasonably possible" to sever the provision in question because severability would not hinder the goal of the Ordinance, which is to restrict the advertisement of cigarettes and alcohol. We cannot say that the Council would not have passed the Ordinance without this minor provision.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion. The City is entitled to its costs in this appeal.

AFFIRMED in part and
REVERSED and REMANDED in part.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 7619

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC.,

Plaintiff,

—v.—

CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION AND ORDER

This action involves a frontal attack by Federation of Advertising Industry Representatives, Inc. ("Federation"[1]) on an ordinance ("Ordinance," now Chicago Municipal Code ("Code") § 5.17) that was initially adopted by the City of Chicago ("City") on September 10, 1997 and was then amended on February 6, 1998, and that imposes substantial

[1] This shorthand designation is used in preference to Federation's acronymic self-designation "FAIR," not so much to express a value judgment about such a self-laudatory term (something that is all too common among the names that organizations seem to choose with an eye toward the acronyms that those names thus make available) as because of this Court's general preference for the use of names rather than alphabet-soup initials to refer not only to parties litigant but also to such things as legislative enactments.

prohibitions on the advertising of both cigarettes and alcohol in any "publicly visible location" (a term that is defined to include outdoor billboards, sides of buildings and free-standing signboards) in major areas of Chicago. To a substantial extent Federation's arguments are constitutional in nature, but in material part Federation challenges the validity of the ordinance in the face of the statutory preemption enacted by Congress as part of the Federal Cigarette Labeling and Advertising Act ("Act," 15 U.S.C. §§ 1331-1341).

As the Act's title indicates, by its terms that statutory provision (Act § 1334, often referred to here as the "Preemption Statute") bears directly on the Ordinance's provisions regarding cigarette advertising. But as a later section of this opinion demonstrates, the ordinance's invalidity in those terms also impacts on the related prohibition of alcohol advertising. In any event, both because the constitutional arguments (both pro and con) are largely arcane and because of the long-entrenched jurisprudential principle that arguments as to constitutionality should be faced only if some less fundamental basis for disposition is unavailable,[2] this opinion will address only the federal preemption issues.

What is implicated in that respect are the meaning and applicability of this provision of the 1969 amendment to the Act—the Preemption Statute, found at Act § 1334(b):

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

---

[2] See Justice Brandeis' famous concurrence in *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936), which is still regularly invoked by Supreme Court Justices both in majority opinions (see, e.g., *United States v. National Treasury Employees Union*, 513 U.S. 454, 478 (1995)) and in concurring opinions (see, e.g., *Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1021 (1998)), to say nothing of dissenting opinions urging that a Court majority should not have reached some constitutional issue.

In its original form that provision had created a much narrower scope of preemption, which was focused only on forbidding any variants (whether federal, state or local) on the federally-prescribed legend to be placed on cigarette packages:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[3]

But when in 1969 Congress strengthened the package warning label by shifting from a statement that cigarette smoking "may be hazardous" to the stronger statement that it "is dangerous," Congress not only broadened the preemptive force of the federal legislation but it did so in the less pinpointed language that has first been quoted in this paragraph.

It should be emphasized that this Court holds no brief for smoking as a habit, nor does it any way minimize the enormous costs in health (or, to be even more plain, in deaths) that are annually sustained because of smoking. In accordance with what it would guess probably represents the views of the vast majority of Americans, this Court has been appalled by recent revelations about what is reported to be a level of total callousness on the part of the tobacco industry—an industry that, if those revelations are true, was fully aware that the old pejorative label of "coffin nails" was literally as well as figuratively an accurate description of cigarettes, and yet the industry deliberately concealed that knowledge to maintain and increase its profits.

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[3] [Footnote by this Court] Both that original version and the current version of Act § 1334(b) were and are an accompaniment to the still-existing preemption provision of Act § 1334(a), which proscribes any statement on cigarette packages other than the warning prescribed by Congress:

> No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

But the ruling that is set out hereafter is *not* a function of the desirability or undesirability of permitting either cigarette billboard advertising or the cigarette industry's encouragement of smoking by minors. After all, this Court's role is not a legislative one, in which it is free to formulate or implement social policy by its pronouncements. Instead this Court is called upon to determine whether Congress intended to leave open to local governments such as City the ability to prohibit cigarette advertising based on health concerns, an area that Congress has chosen to occupy in part by requiring strong warnings on cigarette packages, but in which area Congress has *not* chosen (as it might have) to impose a universal prohibition or partial prohibition of billboard advertising because of health concerns—or, with Congress not having chosen to take that route, in which it has also *not* chosen instead to announce legislatively that state and local governments have a continuing power to prohibit billboard advertising on health-related grounds.

In terms of the appropriate construction and application of the Preemption Statute, all three of the submitters[4] seek to rely on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a reliance that is scarcely surprising in view of that decision's having considered the very preemption provision that is implicated here. But *Cipollone* really does not mark out a path for resolution of the issue posed in this case. Not only did *Cipollone* address the preemption or nonpreemption of state-based activities in a very different context (the area of state common law claims based on the use of tobacco), but also Parts V and VI of Justice Stevens' *Cipollone* opinion (which might have held the greatest promise for casting light on the quite different questions involved here, at least in the language of the discussion if not via the actual decision) did not command a majority of the Court. Instead the Stevens

[4] On July 28 this Court granted the last-minute motion of the United States for leave to file a brief amicus curiae, in which it supports City's position. That brief is addressed—albeit briefly (an aside for fans of Tom Swifties)—in the Appendix to this opinion.

opinion carried a plurality of four Justices, and it is not at all clear from the three-Justice partial concurrence and partial dissent authored by Justice Blackmun or from the two-Justice partial concurrence in the judgment and partial dissent authored by Justice Scalia just what might be considered as the *Court's* views on the problem that is presented here.

What *Cipollone* does teach, however—found in the earlier portion of Justice Stevens' opinion in which he speaks for the Court—provides a valuable springboard for further analysis. To begin with, *Cipollone*, 505 U.S. at 517 (citations omitted) taught that the Act's preemptive scope was to be measured *entirely* by the express language in Act § 1334, without reference to any notions of implied preemption stemming from the substantive provisions of the legislation:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act [Act § 1334]. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn.

And next, *Cipollone*, *id.* at 518-19 expressly stated that the precise and narrow 1965 version of Act § 1334(b)—concededly very different from the 1969 version now at issue—did

no more than to preempt state (as well as federal) rulemaking bodies from imposing *labeling* requirements other than those prescribed by Congress.

With that background, it is time to look at the prohibitions that are set out in the Ordinance, which must be examined in light of the broader 1969 version of the Preemption Statute that is still in place today. Here is Code § 5.17 as enacted, immediately following the Ordinance's recital of fully 10 "Whereas" clauses that the City Council has specified as the basis supporting that enactment:

> (a) No person may place any sign, poster, placard or graphic display that advertises cigarettes or alcoholic beverages in a publicly visible location. In this section, "publicly visible location" includes outdoor billboards, sides of buildings, and freestanding signboards. This section shall not apply to:
>
> 1. (A) With respect to cigarettes, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-64 of this code; or (B) With respect to alcoholic beverages, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-60 of this code; or (C) On commercial vehicles used for transporting cigarettes or alcoholic beverages;
>
> 2. (A) With respect to cigarettes, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-64 of this code that has been placed for the purpose of identifying such premises; or (B) With respect to alcoholic beverages, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-60 of this code that has been placed for the purpose of identifying such premises;
>
> 3. Any sign that contains a generic description of cigarettes or alcoholic beverages;

4. (A) With respect to cigarettes, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-64 of this code that is provided as part of a promotion of a particular brand of cigarettes; or (B) With respect to alcoholic beverages, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-60 of this code that is provided as part of a promotion of a particular brand of alcoholic beverage;

5. Any sign at a special event, as that term is defined in section 10-8-335 of this code;

6. Any sign on a CTA vehicle;

7. Any sign on property owned, leased or operated by the Illinois Sports Facilities Authority;

8. Any sign at Comiskey Park, Soldier Field, the United Center, or Wrigley Field;

9. Any sign on property adjacent to an interstate highway; or

10. Any sign located in a C3 District (Commercial-Manufacturing), a C4 District (Motor Freight Terminal), or any M District (Manufacturing).

(b) This section shall not be construed to permit any display that is otherwise restricted or prohibited by law.

(c) The penalty for violation of this section shall be as set forth in section 11.13 of this Title.[5]

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[5] [Footnote by this Court] Originally Ordinance § 2 contained a provision that made the new enactment applicable only to, "or interpreted to have an effect on," any contract executed after the Ordinance's effective date and any renewal of a preexisting contract that began after the effective date. Because Ordinance § 3 specified that it would take effect 30 days after its passage and publication, the City Council then became concerned that too many actions that might have been taken during that 30-day period could have gutted the effectiveness of the Ordinance. Accordingly, on February 6, 1998 the City Council amended the Ordi-

And now at last to the task at hand. City seeks to place heavy reliance on the Fourth Circuit's decision in *Penn Advertising of Baltimore, Inc. v. Mayor & City Council of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995), vacated and remanded 518 U.S. 1030 (1996) for further consideration in light of 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1986), and then readopted (101 F.3d 332 (4th Cir. 1996)) as modified by the contemporaneously-issued opinion in *Anheuser Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996). *Penn Advertising* rejected the claimed preemption by the Act of a Baltimore ordinance (on which Chicago has modeled its own Ordinance) on a basis stated succinctly in these terms, 63 F.3d at 324 (emphasis in original):

> Applying the methodology described in *Cipollone* to Ordinance 307, we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*.

Two things make that ruling unpersuasive here. For one thing, the Second Circuit in *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 72-74 (2d Cir. 1994) has taken a much more

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nance by sharply limiting any such grandfather clause, eliminating the earlier version of Ordinance § 2 and substituting instead:

> This ordinance shall take effect upon its passage and approval. Provided, however, that no affected sign, poster, placard or graphic display that was in place in a publicly visible location before January 31, 1998, need be removed pursuant to this ordinance for 180 days from the effective date of this ordinance. Provided further, that no replacement, alteration or substitution of an affected sign, poster, placard or graphic display shall be permitted during said 180-day period.

Federation launches a separate attack on the constitutionality of that amendatory provision, but given the nature of this opinion that constitutional issue is another question that need not be resolved here.

analytical and reasoned approach to the reading of the Preemption Statute than the sort of ipse dixit statement just quoted from *Penn Advertising* (which it will be noted begins by contrasting two concepts—"location" versus "content"—that are found nowhere in the congressional language of the Preemption Statute). And second and more important, the ensuing discussion in this opinion explains that the very nature and origin of Chicago's Ordinance bring it squarely within the literal coverage of the Preemption Statute, leaving no room for a reading that deviates from that coverage.

There is of course no question that the Ordinance contains a "prohibition," so that it clearly conforms to one component of the Preemption Statute. Nor is there any question that the Ordinance's "prohibition" is "with respect to the advertising or promotion of cigarettes," so that it equally clearly conforms to another of the Preemption Statute's essential requirements. Where the parties part company is on the sole remaining question: whether, in the language of the Preemption Statute, the prohibition is "based on smoking and health."

Taking a leaf[6] from the pages of *Penn Advertising*, City begins its argument on that score by emphasizing that the Ordinance "regulates only the location, not the content, of tobacco billboards" (City Mem. 2). That position of course ignores the express provision of the Preemption Statute that outlaws not only (1) any state law "*requirement* . . . based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes" but also (2) any "*prohibition* based on smoking and health. . .with respect to the advertising or promotion of . . . cigarettes." To be sure, a "requirement . . . with respect to the advertising or promotion of . . . cigarettes" may well consist of a regulation of advertising *content* (for example, the same kind of state-dictated or locally-dictated delivery of information that was the sole subject of the original 1965 version of the Preemption Statute, or

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6 A tobacco leaf?

that was the subject of the ordinance at issue in *Vango Media*). But by contrast, a "prohibition . . . with respect to advertising . . . of cigarettes" denotes a flat-out *bar* of such advertising—and if such a bar in terms of location is indeed "based on smoking and health," it is still specifically forbidden by the express terms of the Preemption Statute. Hence what City has sought to pose in that respect by setting off "location" against "content" is really based on a false dichotomy that is not found in the Preemption Statute itself.

But the main string that City seeks to affix to its bow—the argument to which it devotes fully 17 of the 29-plus pages of its memorandum that relate to the cigarette portion of the Ordinance (running from the middle of page 15 to the top of page 32, with all other arguments spanning only from the bottom two lines on page 2 to the middle of page 15)—is the one that bears this heading (City Mem. 15):

> III. The Purpose of the Ordinance is to Promote State Laws Making It Illegal for Minors to Purchase or Be Sold Cigarettes

This time City seeks to create a mutually exclusive universe comprising two elements: one, an ordinance prohibition that is "based on smoking and health," which would concededly run afoul of the Preemption Statute, and the other an ordinance prohibition that is aimed at preventing the *illegal* purchases of cigarettes by, and sales of cigarettes to, minors—things that constitute a preexisting illegality under both 720 ILCS 675/1 § 4-64-200. To facilitate a full understanding of City's arguments in that respect, without running any risk of mischaracterization that would be involved in a paraphrase, here is how City's Mem. 15-16 summarizes its many pages of argument that follow:

> Even if the FCLAA [the Act] were interpreted to preempt regulations governing the mere placement of cigarette advertising and this interpretation were found to be constitutional, the Ordinance still would not be pre-

empted because it is not "based on smoking and health." Rather, the purpose of the Ordinance is to effectuate state and local laws making it illegal for persons under the age of 18 to purchase or be sold cigarettes.

The Ordinance explicitly states that its purpose is to reduce illegal transactions—i.e., cigarette sales to or purchases by minors. Furthermore, the preamble is focused on illegal transactions, not health, and on the connection between outdoor advertising and illegal activities. Indeed, the very first sentence of the Ordinance recites that it is unlawful for any individual under the age of 18 to purchase or be sold cigarettes. All of the recitals, or "whereas" clauses, deal with the illegality of cigarette sales to or purchases by minors, the degree of cigarette consumption by minors, the extent of outdoor advertising of cigarettes, the unique nature of cigarette billboards, the relationship between advertising of cigarettes and consumption of cigarettes, and the need for the Ordinance. Nothing in the recitals indicates that the purpose of the Ordinance, vis-a-vis cigarettes, is anything other than preventing illegal transactions.

In thus attempting to separate the prevention of illegal transactions from the Preemption Statute's provision that bars any "prohibition based on smoking and health" with respect to cigarette advertising, City seeks to downplay a few of the "Whereas" clauses that precede the ordinance itself—a clause that contains references to articles in scientific journals that Federation (for its part) portrays as bearing heavily on the effects of smoking on health, as well as a clause that begins "Studies have shown that our nation's adolescents commonly use cigarettes, and that cigarettes constitute a 'gateway' drug for these youth, i.e., a substance which is used by adolescents as a first drug and opens the door for use of other 'harder' substances at a later date." And in a further effort to buttress that second dichotomy, which seeks to lay stress on the hoped-for reduction of illegal transactions (cigarette sales to

or purchases by minors) as assertedly unrelated to "smoking and health." City similarly denigrates Federation's efforts (Federation Preemption Mem. 7-16) to point (1) to the already referred-to portions of the "Whereas" preambles, (2) to statements of various aldermen in the course of the hearings on the Ordinance that linked its purposes to health concerns and (3) to documents contained in the legislative record that reflect the same linkage.

But all of those efforts turn out (to make a bad pun) to be nothing more than a smoke screen. What instead proves to be fatal to City's case is that the entire structure of its argument, erected as it is on the supposed distinction between a stated goal of preventing illegal cigarette sales to or purchases by minors (City's characterization of the ordinance) and a goal that links "smoking and health" (and would thus come within the *express* prohibition of the Preemption Statute), collapses because it proves to be built on a foundation of quicksand—of City's outright misrepresentation of the Ordinance's underpinning.

In that regard, here is what City's Mem. 20 states as the purported justification for that supposed contrast between (1) the ordinance's several "Whereas" clauses that reiterate a concern for promoting the purpose of preventing illegal cigarette sales to or purchases by minors and (2) any linkup between "smoking and health" as a basic purpose of the Ordinance:

> First, plaintiff is incorrect about the historical basis for state laws making it illegal to sell cigarettes to minors. Such laws were originally enacted before the health risks of cigarette smoking were established. A law making it illegal for any person to "sell, buy or furnish any cigar or cigarette or tobacco in any of its forms, to any minor under sixteen years of age" was enacted in Illinois as early as 1887. *See* 1887 Ill. Laws 298 (codified at Ill. Comp. Stat. ch. 38, sec. 207h) (City's 12(n), Ex. C) . The first medical studies suggesting a connection between smoking and illness did not appear until the 1920's. *See Cipollone*, 505 U.S. at 513. Historically, such laws fall

> within a category of laws pertaining to activities that were lawful for adults, but viewed as *morally* inappropriate for children, such as gambling, acquiring pornography or purchasing alcoholic beverages. These laws might have incidentally protected the health of minors, but this was not the principal objective. *See* Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. Legis. 1, 16 (1997). Plaintiff thus has failed to show that the state law the Ordinance seeks to effectuate is itself based on health.

Not to put too fine a point on matters, that statement is simply and demonstrably false, and it has required no more than a few minutes' search by this Court to prove it.[7]

Ecclesiastes 1:9 and 1:10 had it right:

> The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun. Is there any thing whereof it may be said, See, this is new? it hath been already of old time, which was before us.

Listen to what the Illinois Supreme Court said exactly a century ago in upholding the validity of the then-existing prohibition against cigarette sales to minors (basically the same prohibition that is now in force, both in the state statute and

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[7] It is frankly astonishing for City to have made the just quoted statements in the text. Only a moment's resort by this Court to 720 ILCS 675/1, which is the current version of the 1887 Illinois statute to which City refers (the statute that was in turn the precursor of City's prior and present versions of its earlier-quoted ordinance containing like prohibitions against cigarette sales to and purchases by minors), was needed to disclose that the Illinois Supreme Court decision referred to in the next paragraph of the text is the *only* case cited as an annotation to that statute. This Court does not of course suggest that City's counsel intentionally suppressed any reference to that vitally important decision—rather the omission of any mention of that decision, when coupled with City's Memorandum's flatly incorrect portrayal just quoted in the text, has to reflect seriously (indeed, fatally) inadequate research on counsel's part.

in the Code, but with such minor changes as increasing the age of the prohibition from 16 years to 18 years). Here is *Gundling v. City of Chicago*, 176 Ill. 340, 347-49, 52 N.E. 44, 45-46 (1898), which is quoted at length because of its obvious and compelling significance to the present dispute:

> The measure has relation to the public health, and is required in that interest. With this object evidently in view, the legislature passed an act, approved June 15, 1887, in force July 1, 1887, entitled "An act to prohibit selling, giving or furnishing tobacco, in any of its forms, to minors, and providing a penalty therefor." Section 1 of said act provides: "That hereafter no person or persons in this state shall sell, buy for or furnish any cigar or cigarette, or tobacco in any of its forms, to any minor under sixteen years of age, unless upon the written order of parent or guardian." Section 2 provides that, if any person or persons shall violate the provisions of Section 1, he, she, or they shall, on conviction thereof, forfeit and pay for each offense the sum of $20. The object and purpose of this enactment were to subserve and protect the health and welfare of the class of persons to whom the act refers, and to whom a sale is forbidden. The consensus of opinion in reference to the use of cigarettes is that they are injurious to the young with immature minds, and common observation causes us to know that tobacco in the form of cigarettes is more largely used by those of young and immature minds than by any other class.
>
> It is urged by appellant that the city council has no right to single out a particular form of manufactured tobacco, and provide for its regulation, and require a license for its sale, without making the requirement apply to all the forms in which tobacco may be used. It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly

provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that particular form of tobacco. Paragraph 66, before quoted, expressly authorizes the adoption of ordinances necessary to police power; and paragraph 78 is an express authorization of the city council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions, express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort, and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation. *Ferguson v. City of Selma*, 43 Ala. 400.

The regulation of police power is hardly susceptible of exact definition, as the exigencies of each case are varying, and the cases are innumerable where the health of the inhabitants of the municipality may be in some degree endangered. When the city council considers some occupation or thing dangerous to the health of the community, and, in the exercise of its discretion, passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent, and the consequences of neglect are more detrimental to the public good, in this than in any other form of local evil. It being clear that the public health and welfare of a large class in the community would be subserved and protected by

> ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by paragraphs 66 and 78. An ordinance of this character is not in conflict with any principle of the common law, or with any public or general statute, and infringes no private right not necessarily infringed in the interests of good government. It subserves the public welfare, protects the health of the community, and is included within the express powers granted the city council. The ordinance was not void.

Incidentally, *Gundling* was then affirmed by the United States Supreme Court (177 U.S. 183 (1900)), but as might be expected the affirmance made only brief passing reference to the essentially state law question of enacting legislation based on considerations of public health (*id.* at 188, 189).

What we have in this case, then, is an Ordinance that—placing the definitional terms of the Preemption Statute in quotation marks—is a "prohibition" of cigarette billboard "advertising" that is unquestionably "based on smoking and health." As to the latter term, the only one by which City relies to extricate itself from the Preemption Statute, on the City's own version of the matter the Ordinance is aimed at illegal sales of cigarettes to minors, and *Grundling* demonstrates beyond peradventure that *the* reason for such sales having been made illegal in the first place was the perceived threat to the health of those minors.[8] In those terms there is no

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[8] If there were any doubt on this score, based on some sleight-of-hand notion that the Ordinance's predominant focus is on illegality rather than on the health-related considerations that prompted that illegality to begin with, it would be dispelled by the Supreme Court's decision in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 106-07 (1992) (decided less than a week before *Cipollone*) that any provision that "serves several objectives rather than one" is still preempted even though fewer than all of those objectives are within the preempted

ambiguity whatever in the Preemption Statute, or in its all-fours application to the Ordinance under *Cipollone*, 505 U.S. at 517, and that spells both the beginning and the end of the statutory analysis. City is thus hoist by its own petard: It has itself demonstrated (although perhaps inadvertently, given its fundamentally flawed research) that the Ordinance is pre-empted by the Preemption Statute and that it is hence invalid as it relates to cigarette advertising.

All that remains for consideration is whether the ordinance's provisions relating to the corresponding prohibition of alcohol advertising, a prohibition that is not within the scope of the same preemption analysis, should survive despite the just-announced invalidation of the Ordinance's prohibition against cigarette advertising. That is of course a function of the Ordinance's severability or nonseverability, a question of state law (*Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam)). And although the parties are again at odds in their proposed resolution of that question, they have no quarrel as to the standards that are consistently announced and applied by the Illinois Supreme Court in that respect—see *Cincinnati Ins. Co. v. Chapman*, 181 Ill.2d 65, 81-82, 691 N.E.2d 374, 381-82 (1998) (citations omitted):

> Although we acknowledge the severability clause contained in section 55 of the Act, such a clause is not necessarily conclusive as to whether the remainder of the Act can stand. A court's authority to eliminate invalid elements of an act and yet sustain its valid provisions derives not from legislative fiat, but rather from the powers inherent in the judiciary. In fact, the practice of holding statutory provisions severable from those that are found to be invalid originated in the judiciary "long before the innovation of separability clauses." Thus, although the use of severability clauses has become a

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area. But that is simply an added and really unnecessary fillip, for any attempted distinction in those terms is really a distinction without a difference.

> "common legislative drafting practice" in "modern" times, it is "regarded as little more than a mere formality."
>
> Due to the historical background of the severability clause, courts view the clause not as "an 'inexorable command,' " but as an aid to statutory construction. Indeed, this court has long held that the test of severability is whether the valid and invalid provisions of the Act are " 'so mutually "connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently ***".' "

In this instance the ordinance itself contains no specific severability clause, unlike a whole set of other provisions of the Code that do contain such specific clauses. And given the teaching of *Cincinnati Ins.* and other cases that even a specific severability clause is "regarded as little more than a mere formality," that notion of "mere formality" clearly applies a fortiori where, as here, City points only to the general severability clause in Code § 1-4-200 (a well-established principle recently reconfirmed in *People v. Warren*, 173 Ill.2d 348, 371-72, 671 N.E.2d 700, 712 (1996)).

This Court has examined the cases cited by both sides with care. Any reader of the most recent extended pronouncements of the Illinois Supreme Court in this area (*Cincinnati Ins.*, 181 Ill.2d at 85-86, 691 N.E.2d at 383; *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 464-66, 689 N.E.2d 1057, 1103-04 (1997)) cannot help but be struck by that Court's tendency, in its search for legislative intent, to treat intricately interwoven legislative provisions such as the Ordinance—with its common focus on the prohibition of advertising and on the protection of minors, though protecting against two perceived evils—as the type of integrated whole that triggers infectious invalidity. And that approach appears especially appropriate here, where the numerous "Whereas" clauses that the City

Council has used to underpin the Ordinance either treat tobacco and alcohol as a paired entry (as is done in the text of the Ordinance) or focus almost entirely on cigarette-related considerations, picking alcohol up only as a sort of caboose attached to the cigarette train.

Accordingly this Court finds no real predicate for determining that the restraints on alcohol advertising should survive independently of those on cigarette advertising. If the City Council wishes on reconsideration of the subject of alcohol advertising as an independent matter free of any preemption problems (but also being aware of the other challenges that have been posed by Federation), it is free to do so in the future. But for now, just as in *Cincinnati Ins.* and *Best*, the invalid portions of the Ordinance cannot rationally be severed from the residue, and the entire Ordinance must fall.

Conclusion

This opinion has dealt with the subject of preemption of the Ordinance by the federal Preemption Statute, an issue brought on for resolution by Federation's motion for summary judgment on that score and City's response to that motion. Both sides have complied with the requirements of Fed. R. Civ. P. ("Rule") 56 and this District Court's implementing provisions of General Rule 12(M) and 12(N) in that respect. Because there is no genuine issue of material fact and Federation is entitled to a judgment as a matter of law, the Ordinance must be found to be invalid in its entirety.

In accordance with the prayer for relief in Federation's Complaint:

> 1. This Court declares that the Ordinance is preempted by Act § 1334(b) and is therefore null, void and of no legal effect.
>
> 2. City and all of its officers, agents, servants, employees and attorneys are permanently enjoined from enforcing the Ordinance or taking any action pursuant thereto.

That effectively provides Federation with full relief,[9] except for its unresolved prayers for attorneys' fees (an issue that does not affect the finality of this order—see *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988)) and for damages (an issue as to which Federation, although having the burden of proof, has provided no evidence in support of its motions for summary judgment, so that its prayer is denied). Accordingly this is a final order disposing of this action.

/s/ MILTON I. SHADUR
Milton I. Shadur
Senior United States District Judge

Date: July 29, 1998

[9] This opinion's determination as to preemption of course moots all of the other areas of dispute between the litigants, and that being the case, no view is expressed by this Court on the subject of the Ordinance's constitutionality or unconstitutionality.

Appendix

As n.4 reflects, this Court has granted the last-minute motion of the United States for leave to file an amicus curiae brief. Because the analysis in the text of this opinion renders the position that has been advanced by the United States a nonmaterial digression, this Appendix will deal with the United States' argument briefly and separately.

Essentially the United States contends that only it can provide an interpretation of the Preemption Statute that is entitled to *Chevron* deference (the familiar doctrine that is named after *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). And in that respect the United States points to the statement in *Auer v. Robbins*, 117 S.Ct. 905, 912 (1997) that, at least in the circumstances of that case, the deference customarily due to an agency's interpretation of a statute that it administers was not diminished by the fact that the "interpretation comes to us in the form of a legal brief" rather than in the more conventional way.

But the difficulty with that entire approach in this case is that by its own terms the *Chevron* doctrine does not come into play if the statute at issue is unambiguous in its application to the question at issue in the case. Earlier this year our Court of Appeals has reconfirmed that principle in *Bankers Life and Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998). And as the foregoing opinion has reflected at great length, the Preemption Statute unambiguously covers the Ordinance involved in this case (once, of course, the fresh air of analysis has blown away City's smoke screens that have sought to obscure the fact that the cigarette advertising prohibition in the Ordinance is indeed "based on smoking and health").

Hence the United States' amicus curiae submission adds nothing to the dialogue. What has been said in the text of the opinion stands.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Nos. 98-3191, 99-1115 & 99-1516
October 14, 1999

Before
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, THE CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 97 C 7619—Milton I. Shadur, *Judge*.

ORDER

Upon consideration of the petition for rehearing en banc filed by Plaintiff-Appellee on September 14, 1999, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

ORDINANCE

WHEREAS, Illinois law and the Municipal Code of Chicago make it unlawful for any individual under 18 years of age to purchase or be sold cigarettes, and make it unlawful for any individual under 21 years of age to purchase or be sold alcoholic liquor; and

WHEREAS, more than three million minors under the age of 18 consume more than 947 million packs of cigarettes annually in the United States, yielding gross sales to the tobacco industry each year of approximately $1 billion; and

WHEREAS, cigarettes are the most heavily advertised product in America, and the tobacco industry spends more than $421 million annually for outdoor advertising of cigarettes, and alcoholic beverages are the second most heavily advertised products in America, and the alcoholic beverages industry spends more than $100 million annually for outdoor advertising of its products; and

WHEREAS, outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as contrasted with, for example, newspapers, magazines, or radio; and

WHEREAS, the Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services; and

WHEREAS, in addition to judicial recognition of the general link between advertising and consumption, there is evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors, including articles in the *New England Journal of Medicine*, *American Journal of Public Health*, *Journal of Pediatrics*, and other scientific journals, and research has also shown that children's attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements; and

WHEREAS, studies have shown that our nation's adolescents commonly use cigarettes, and that cigarettes constitute a "gateway" drug for these youth, i.e., a substance which is used by adolescents as a first drug and opens the door for use of other "harder" substances at a later date; and studies have also shown a strong correlation between alcohol use and juvenile crime, that a striking association exists between juvenile alcohol use and suicide by firearm, and that alcohol use by minors correlates with drowning accidents, diving accidents, and school truancy and damage to school property; and

WHEREAS, an ordinance restricting the placement of advertisements for cigarettes and alcoholic beverages in publicly visible locations within the City of Chicago is a reasonable and necessary measure for reducing illegal transactions and illegal consumption of cigarettes and alcoholic beverages by minors, and for the promotion of the welfare and temperance of minors exposed to such advertisements; and

WHEREAS, the restrictions contained in the following ordinance will not unduly burden legitimate business activities of persons licensed by the City of Chicago to sell cigarettes and alcoholic beverages on a retail basis; and

WHEREAS, in order to protect legitimate business activities and to narrowly focus its efforts on those advertisements which most directly affect minors where they live, attend school, attend religious services and engage in recreational activities, the City Council has determined not to restrict advertisements of cigarettes or alcoholic beverages in certain areas hereinafter identified; now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL
OF THE CITY OF CHICAGO:

SECTION 1. Title 17 of the Municipal Code of Chicago is hereby amended by inserting a new Section 5.17, as follows:

5.17 Cigarette and alcoholic beverage advertisements.

(a) No person may place any sign, poster, placard or graphic display that advertises cigarettes or alcoholic beverages in a publicly visible location. In this section, "publicly visible locations" includes outdoor billboards, sides of buildings, and freestanding signboards. This section shall not apply to:

1. (A) With respect to cigarettes, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-64 of this code; or (B) With respect to alcoholic beverages, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-60 of this code; or (C) On commercial vehicles used for transporting cigarettes or alcoholic beverages;

2. (A) With respect to cigarettes, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-64 of this code that has been placed for the purpose of identifying such premises; or (B) With respect to alcoholic beverages, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-60 of this code that has been placed for the purpose of identifying such premises;

3. Any sign that contains a generic description of cigarettes or alcoholic beverages;

4. (A) With respect to cigarettes, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-64 of this code that is provided as part of a promotion of a particular brand of cigarettes; or (B) With respect to alcoholic beverages, any neon or electrically charged sign on premises by a holder of a license required by chapter 4-60 of this code that is provided as part of a promotion of a particular brand of alcoholic beverage;

5. Any sign at a special event, as that term is defined in section 10-8-335 of this code;

6. Any sign on a CTA vehicle;

7. Any sign on property owned, leased or operated by the Illinois Sports Facilities Authority;

8. Any sign at Comiskey Park, Soldier Field, the United Center, or Wrigley Field;

9. Any sign on property adjacent to an interstate highway; or

10. Any sign located in a C3 District (Commercial-Manufacturing), a C4 District (Motor Freight Terminal), or any M District (Manufacturing).

(b) This section shall not be construed to permit any display that is otherwise restricted or prohibited by law.

(c) The penalty for violation of this section shall be as set forth in section 11.13 of this Title.

SECTION 2. This ordinance may only be applied to, or interpreted to have an effect on, any contract executed after the effective date of this ordinance and to any renewal term, beginning after the effective date of this ordinance, of a pre-existing contract.

SECTION 3. This ordinance shall take effect 30 days after its passage and publication.

/s/ [ILLEGIBLE]
Alderman, 25th Ward

/s/ [ILLEGIBLE]
Alderman, 17th Ward

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1999

(Argued: September 7, 1999

Decided: October 25, 1999)

Docket No. 99-7006

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION and THE ADVERTISING CLUB OF NEW YORK, INC.,

Plaintiffs-Appellees,

—v.—

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings and ALFRED C. CERULLO, III, in his official capacity as Commissioner of the New York City Department of Finance,

Defendants-Appellants.

Before:

MCLAUGHLIN, CALABRESI, SOTOMAYOR,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Batts, *J.*), enjoining the enforcement of a New York City ordinance, the "Youth Protection against Tobacco Advertising and Promotion Act," and declaring the ordinance preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.*, and the Supremacy Clause of the United States Constitution.

AFFIRMED in part, REVERSED in part, and REMANDED.

FLOYD ABRAMS, Cahill Gordon & Reindel, New York, NY (Jonathan Donnellan, Joel Kurtzberg, Matthew A. Leish, Cahill Gordon & Reindel, Howard B. Tisch, Greater New York Metropolitan Food Council, Inc., on the brief), *for Plaintiffs-Appellees.*

ELIZABETH S. NATRELLA, Corporation Counsel's Office, City of New York, New York, NY (Michael D. Hess, Corporation Counsel, Leonard J. Koerner, and Deborah Rand, on the brief), *for Defendants-Appellants.*

DOUGLAS N. LETTER, United States Department of Justice, Washington, DC, submitted a brief and argued *for amicus curiae*, United States of America.

ELIOT D. PRESCOTT and JANE R. ROSENBERG, Assistant Attorneys General, Attorney General's Office, State of Con-

necticut, Hartford, CT, submitted a brief *for amicus curiae*, State of Connecticut.

DONALD W. GARNER, Pepperdine University Law School, Malibu, CA, submitted a brief *for amici curiae*, American Medical Association, American Heart Association, American Lung Association, American Cancer Society, Center for Science in the Public Interest, Public Citizen, Inc., Medical Society of the State of New York, Protect Our Youth, New York Public Interest Research Group, Project Friend, League of Women Voters of New York State, Campaign for Tobacco-Free Kids, The Diocese of Brooklyn Drug Prevention Program, Smokefree Educational Services, Inc., New York State Occupational Therapy Association, Coalition for Smokefree Harlem, The Heart of Harlem Cardiovascular Disease Prevention Program, Boriken Neighborhood Health Center, Bushwick Community Service Society, New York County Medical Society, Unidos Coalition, New Jersey Gasp, Alliance for Smoke-Free Air, Montefiore Medical Center/Albert Einstein Cancer Center.

ARTHUR N. EISENBERG, New York Civil Liberties Union, New York, NY submitted a brief *for amicus curiae*, New York Civil Liberties Union.

RICHARD A. SAMP and DANIEL J. POPEO, Washington Legal Foundation, Washington, DC submitted a brief *for amicus curiae*, Washington Legal Foundation.

MCLAUGHLIN, *Circuit Judge*:

BACKGROUND

This appeal stirs up a volatile mix of anti-tobacco legislation, federal preemption and First Amendment limitations upon commercial speech.

In early 1998, New York City enacted Local Law No. 3. It is entitled the "Youth Protection Against Tobacco Advertising and Promotion Act," and is codified as Article 17-A to Title 27, Chapter 1, subchapter 7, of the New York City Administrative Code §§ 27-508.1 to 27-508.6 ("Article 17-A"). Article 17-A prohibits most outdoor advertising of tobacco products (other than tobacco advertisements on motor vehicles) within one thousand feet of any school building, playground, child day care center, amusement arcade or youth center. It also prohibits most indoor advertising in the same areas if the advertisements can be seen from the street. There is one exception to the ban: a single, black-and-white, text-only "tombstone" sign stating, "TOBACCO PRODUCTS SOLD HERE," may be placed within ten feet of an entrance to a store where tobacco products are sold.

Section 1 of Local Law 3 contains a "Declaration of legislative findings and intent." According to the Declaration, Article 17-A's purpose is "to strengthen compliance with and enforcement of laws prohibiting the

sale or distribution of tobacco products to children and to protect children against such illegal sales."

Article 17-A also contains a severability clause, stating that if any portion of the ordinance should be found invalid, this will not affect the remaining portions.

On the day that Mayor Giuliani signed Article 17-A into law, the plaintiffs, various supermarket and advertising associations (collectively, the "Advertisers") brought this § 1983 action against New York City, Mayor Giuliani, and two other city officials responsible for enforcing Article 17-A (collectively, the "City") in the United States District Court for the Southern District of New York (Batts, *J.*). The Amended Complaint seeks declaratory and injunctive relief. It alleges that: (1) Article 17-A is preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331, *et seq.* (1994), and therefore violates the Supremacy Clause of the United States Constitution; and (2) Article 17-A unconstitutionally restricts commercial speech in violation of the First Amendment. After some discovery, all parties moved for summary judgment.

Relying heavily on *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994), the district court found that Article 17-A was preempted by the FCLAA's preemption provision: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b).

Noting that § 1334(b) applies to laws of political subdivisions, as well as states, *see id.* § 1332(3), the district court found that the express language of the preemption

provision embraced Article 17-A. The court rejected the City's argument that it should look to congressional intent to determine the preemptive scope of the provision. The district court found no need to examine congressional intent "in light of the fact that both the Supreme Court and the Second Circuit have directed that reliance on the express preemption provision is appropriate." Accordingly, the court awarded the Advertisers summary judgment and permanently enjoined the enforcement of Article 17-A. The district court did not reach the Advertisers' First Amendment claim.

The City now appeals. Several *amici curiae* have weighed in on both sides of the dispute.

DISCUSSION

We review a district court's award of summary judgment *de novo*, drawing all inferences and resolving all ambiguities in favor of the nonmoving party. *See Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997). Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

I. *Preemption*

We are asked to determine whether and to what extent Article 17-A is preempted by the FCLAA. The district court concluded that the FCLAA preempted Article 17-A in its entirety. We conclude, however, that the FCLAA only partially preempts Article 17-A. While the ordinance's "tombstone" provision is preempted, the

restrictions on advertising within a thousand feet of a school or playground, etc., may stand.

A. *Preemption Principles*

The Constitution directs that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Under the doctrine of preemption, a corollary to the Supremacy Clause, any state or municipal law that is inconsistent with federal law is without effect. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Federal law may preempt state and municipal law expressly or impliedly. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-204 (1983). Where, as here, a statute expressly preempts state law, our task is to "identify the domain expressly pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

As the Supreme Court has recently emphasized, we must read express preemption provisions in light of two well settled principles. *First*, our interpretation of the provision is guided by the principle that "the purpose of Congress is the ultimate touchstone in every pre-emption case," *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (citation and internal quotations and alteration omitted); and we discern congressional intent not only from the language of the preemption statute, but also from the statutory framework surrounding the provision, the "structure and purpose of the statute as a whole," and our "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (internal quotations omitted). *Second*,

because of federalism concerns, we must interpret Congress's intent strictly, beginning with the presumption that Congress did not intend to displace state law. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Accordingly, we will not find preemption "unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

B. *The Preemptive Scope of the FCLAA*

We start with the FCLAA's preemption language: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Unhappily, this text provides little insight into the preemptive scope intended by Congress. The ambiguity resides primarily in the open-ended language extending preemption to obligations "with respect to" advertising and promotion of cigarettes. Read literally, these words could be misunderstood to preempt every conceivable obligation having a relationship—however evanescent—to the advertising and promotion of cigarettes. But this hyper-literal approach would yield results that Congress surely did not intend. To take an absurd example, it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there. Or to borrow another example mentioned by our sister circuit, it could lead to the conclusion that "states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard." *Federation*

of Advertising Indus. Representatives, Inc. v. City of Chicago, Nos. 98-3191, 99-1115 & 99-1516, ___ F.3d ___, ___, 1999 WL 682015 at *4 (7th Cir. Sept. 1, 1999).

We decline to read § 1334(b) so crudely. As Judge Learned Hand has cautioned, "[t]here is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure." *Central Hanover Bank & Trust Co. v. Commissioner*, 159 F.2d 167, 169 (2d Cir. 1947). And this is especially true in the preemption context, where "the purpose of Congress is the ultimate touchstone," and an overly-expansive, literal interpretation could subvert the presumption against preemption. The Supreme Court recently cautioned against "uncritical literalism" when interpreting similarly open-ended language in the express preemption provision of another federal statute. *Travelers Ins.*, 514 U.S. at 656 (interpreting the Employee Retirement Income Security Act's preemption provision, which extended to state laws that "relate to" any employee benefit plan). And while our analysis of § 1334(b) must perforce begin with its text, "our interpretation of that language does not occur in a contextual vacuum." *Medtronic*, 518 U.S. at 485.

Relying on our decision in *Vango Media*, the district court refused to look beyond the language of § 1334(b) or even to consider congressional intent. *Vango Media*, however, should not be read to "make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (Learned Hand, *J.*), *aff'd*, 326 U.S. 404 (1945). It is not without significance that, while our analysis of § 1334(b)'s preemptive scope in *Vango Media* began

with the language of the provision, *see Vango Media*, 34 F.3d at 72-74, we also went further to consider the stated purpose of the federal act, its historical context, and its legislative history. *See id.* at 74-75. And while we noted that § 1334(b)'s "with respect to" language connotes a potentially expansive preemptive scope, *see id.* at 73-74, we gave effect to that language only because we found that doing so would implement congressional intent. *See id.* at 74. Thus, our "touchstone" remained the legislative purpose underlying § 1334(b), as discerned not only from the language of that provision, but also from other indicia of congressional intent. We adhere to that approach.

Felicitously, Congress has provided valuable insight into the intended scope of preemption under the FCLAA:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

Two conclusions emerge when this statement is read in conjunction with the FCLAA's other provisions. *First*, Congress sought to inform the public about the health dangers of smoking by regulating advertising and labeling information. *See id.* § 1333 (detailing content and format requirements for health warnings on cigarette packages, advertisements, and billboards). *Second*, recognizing the potential burdens on the national economy that might result from the proliferation of "diverse, nonuniform, and confusing" advertising standards, Congress reserved to itself the power to regulate cigarette advertising information. *See id.* § 1334(b) (prohibiting regulations "with respect to" cigarette advertising). As the legislative history confirms, preemption was needed "to avoid the chaos created by a multiplicity of conflicting regulations." S. Rep. No. 91-566 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663.

We must therefore read § 1334(b) in light of: (1) Congress's "comprehensive Federal program" to control cigarette advertising information; and (2) its concomitant concern with avoiding "diverse, nonuniform, and confusing" advertising standards. 15 U.S.C. § 1331. This is the same approach we took in *Vango Media*. There, we held that a New York City ordinance requiring advertisers to display one anti-smoking public health message for every four tobacco advertisements displayed on New York City taxi cabs was preempted under § 1334(b). *See Vango Media*, 34 F.3d at 70. By requiring advertisers to display certain messages about smoking and health (other than those required by the FCLAA), the ordinance risked creating nonuniformity with Congress's federally mandated warning scheme. Accordingly, we found that the ordinance imposed a requirement "with respect to advertising" within the meaning of § 1334(b). It

obstructed Congress' federal scheme to regulate advertising information and risked creating the sort of "diverse, nonuniform, and confusing" standards that Congress wanted to avoid. *Id.* at 74. Noting the laudable goal of informing the public, through advertising, about the health dangers of smoking, we nevertheless held that the means chosen violated the preemption provision which Congress had enacted "in an effort to avoid the chaos of multiple diverse regulations." *Id.* at 70.

This approach tracks the Supreme Court's interpretation of § 1334(b) in *Cipollone*. Although the Court could not garner a majority to agree on how § 1334(b) should be applied in that case itself, a majority of the justices did focus their respective analyses on Congress's stated intent to avoid "diverse, nonuniform, and confusing" advertising standards. *See Cipollone*, 505 U.S. at 529 (plurality opinion) (explaining that while failure to warn claims (which were preempted) involve " 'diverse, nonuniform, and confusing' standards," intentional fraud claims (which were not preempted) do not); *see id.* at 541 (Blackmun, *J.*, concurring in part and dissenting in part) (criticizing the plurality for failing to follow consistently Congress's stated purpose of avoiding "diverse, nonuniform, and confusing regulations").

With this understanding of congressional purpose as our "touchstone," we next turn to Article 17-A, bearing in mind, of course, the presumption against preemption. *See Cipollone*, 505 U.S. at 518.

C. *Article 17-A: The Tombstone Provision*

One provision of Article 17-A clearly presents problems similar to the ordinance in *Vango Media*. Specifically, the tombstone provision limits advertising

information in the restricted areas to black-and-white signs stating "TOBACCO PRODUCTS SOLD HERE;" colors, nontextual images, and non-conforming messages are prohibited. Like the ordinance in *Vango Media*, the tombstone provision thus creates obligations directly pertaining to the nature and content of advertising information. This risks the sort of "diverse, nonuniform, and confusing" advertising standards that Congress expressly sought to avoid. Congress could not have intended to let municipalities promulgate their own unique regulations governing the content and format of cigarette advertising information. *See Phillip Morris Inc. v. Harshbarger*, 122 F.3d 58, 76 (1st Cir. 1997) (noting that "a quintessential state requirement 'with respect to advertising and promotion' would be a law mandating changes or additions to the content of cigarette advertisements") (alteration omitted). Accordingly, we conclude that Article 17-A's tombstone provision is a regulation "with respect to" advertising within the meaning of § 1334(b).

The City nevertheless contends that the tombstone provision is not preempted by § 1334(b). The City makes two arguments. Neither is persuasive.

First, the City asserts that the tombstone provision is not a "requirement or prohibition" within the meaning of § 1334(b) because it is permissive, rather than mandatory. We disagree. Although the tombstone provision is "permissive" in the literal sense that an advertiser is not "required" to post a tombstone sign at all, this does not meaningfully distinguish it from the "requirement" we found preempted in *Vango Media*. That ordinance was similarly "permissive" in that it did not require advertisers to display ads. But if they chose to do so, they had to comply with certain conditions, namely, the posting of a certain number of anti-smoking public health mes-

sages. It is clear that this sort of "permissiveness"—vaguely reminiscent of Hobson's choice—is not dispositive. We find that the tombstone provision imposes a "requirement or prohibition" within the meaning of § 1334(b); it is a "positive enactment" of a political subdivision that "imposes conditions on [the] display of cigarette advertisements." *Vango Media*, 34 F.3d at 72, 75.

Second, the City makes the startling contention that the tombstone provision—and indeed, the entirety of Article 17-A—is not "based on smoking and health" within the meaning of § 1334(b), but is instead aimed solely at promoting law enforcement. For support, the City points to the "Declaration of legislative findings and intent," which announces that the purpose of the ordinance is: "to strengthen compliance with and enforcement of laws prohibiting the sale or distribution of tobacco products to children and to protect children against such illegal sales." We are unpersuaded by this sophistry.

We do not blindly accept the articulated purpose of an ordinance for preemption purposes. *See Vango Media*, 34 F.3d at 73. If that were the rule, legislatures could "nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88, 106 (1992) (quoting *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971)). That the City Council drafted a declaration of intent that recites a law enforcement goal while scrupulously avoiding any mention of the word "health" simply cannot control our preemption analysis. Instead, we

follow *Vango Media* and consider both the *purpose* of the ordinance as a whole, and the ordinance's actual *effect*, to determine whether it is "based on smoking and health." *See Vango Media*, 34 F.3d at 73 (citing *Gade*, 505 U.S. 88).

The *Vango Media* analysis makes clear that Article 17-A is indeed "based on smoking and health." We agree with the district court that the legislative history of the ordinance is "replete" with references to the twin purposes of promoting "health" and combating the dangers of smoking.[1] Moreover, the effect of Article 17-A is clearly to promote health because the underage tobacco sales prohibitions whose enforcement it explicitly seeks to promote are inherently based on health concerns.

We find that Article 17-A's tombstone provision is a "requirement . . . based on smoking and health . . . with respect to advertising or promotion of cigarettes." Accordingly, it is preempted under § 1334(b). We therefore affirm that part of the district court's judgment holding that this portion of Article 17-A was preempted.

D. *Article 17-A: The 1000-Foot Verboten Zone*

We reach a different conclusion as to the remaining provisions of Article 17-A, which essentially regulate

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[1] The Health Committee of the City Council convened on several occasions to consider health-related concerns. The first speaker at the first such meeting, for instance, endorsed the ordinance specifically because "children's lives are at risk." Speaker Peter Vallone, the primary sponsor of the law, himself detailed the health risks of smoking and later urged that "the health and safety of our kids just can't wait." Another City Council member was just as emphatic that "it is a health issue, period." We note also that the law itself provides extensive discussion of the disturbing rise in teen smoking, attributed in part to a proliferation of ads portraying smoking as "safe and healthful."

the physical placement of advertising. As to these provisions, we join the only two federal courts of appeals that have addressed § 1334(b)'s effect on similar laws and hold that they are not preempted. *See Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, Nos. 98-3191, 99-1115 & 99-1516, ___ F.3d ___, ___, 1999 WL 682015 (7th Cir. Sept. 1, 1999); *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1030 (1996), *readopted as modified on remand*, 101 F.3d 332 (4th Cir. 1996)). Specifically, we find that these location restrictions do not impose obligations "with respect to" advertising as that phrase is used in § 1334(b).

Article 17-A's location restrictions do not implicate the same concerns as the ordinance's tombstone provision or the ordinance in *Vango Media*. The location restrictions do not touch upon Congress's "comprehensive Federal program" to control cigarette advertising information. The restrictions do not, for example, burden advertisers with a duty to warn. Nor do they impose content and format requirements on advertising information.

Instead, those provisions restrict only the physical placement of tobacco advertising signs in a manner akin to a run of the mill zoning regulation. To be sure, Article 17-A's restrictions are unusual in that they ban only signs advertising tobacco, and not other products.[2] However, this disparity does not interfere with the congressional purpose underlying the FCLAA. We do not see—and the Advertisers do not explain—how mere

[2] We express no opinion whether this targeting of tobacco advertising runs afoul of the First Amendment. *See infra* at Section II. In this discussion, we conclude only that New York City's regulation of ad placement is not preempted under the FCLAA.

location restrictions can lead to the sort of "diverse, nonuniform, and confusing" advertising standards that Congress sought to avoid when it enacted § 1334(b). *See Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co.*, 126 F.3d 61, 67 (2d Cir. 1997) (discussing ERISA's preemption provision and stating that "a party challenging a statute must convince a court that there is something in the practical operation" of the statute to show that it is the type of law that Congress wanted to preempt). Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without Article 17-A, a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances. And no party suggests that such *zoning* regulations fall within the intended purview of § 1334(b). We see no reason to treat the location restrictions before us any differently.

We also note that the presumption against preemption is particularly strong here, as these provisions are the sort thought to lie within the heartland of the states' historic police powers. *See Medtronic*, 518 U.S. at 485. Zoning regulations on the placement of outdoor advertisements have long been held to lie peculiarly within the states' historic police powers. *See Packer Corp. v. Utah*, 285 U.S. 105, 111 (1932) (upholding a Utah statute banning outdoor advertisements of cigarettes and describing it as a "wholly intrastate" prohibition); *see also Federation of Advertising*, ___ F.3d ___, ___, 1999 WL 682015 at *5 (citing cases). So too, regulations directed at the safety and welfare of children "lie[ ] at the heart of the states' police powers." *Toy Mfrs. of America, Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d Cir.

1992). Article 17-A's location restrictions embody both of these intensely local areas of regulation. Although Congress can choose to preempt such state police power regulations if its intent to do so is "clear and manifest," *Vango Media*, 34 F.3d at 72 (quoting *Cipollone*, 505 U.S. at 516) (internal quotations omitted), we find no such clear intent here. To the contrary, the legislative history of § 1334(b) suggests that Congress wanted to give such regulations a wide berth. *See* S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. at 2663 (noting that § 1334(b) is "narrowly phrased" and "would in no way affect [local power] with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, *or similar police regulations*" (emphasis added)).

E. *Severability*

In light of our determination that only the tombstone provision is preempted by the FCLAA, we must determine whether that provision is severable from the remaining portions of the ordinance. Severability questions are governed by state law. *See Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 60 (2d Cir. 1988). In New York, the test for severability is "whether the Legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.' " *See In re New York State Superfund Coalition, Inc. v. New York State Dep't of Envtl. Conservation*, 75 N.Y.2d 88, 94, 550 N.E.2d 155, 157, 550 N.Y.S.2d 879, 881 (N.Y. 1989) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (N.Y. 1920)).

We find that the tombstone provision is indeed severable from the rest of Article 17-A. That the City

Council would have wished the bulk of Article 17-A to be upheld despite the invalidity of the tombstone provision seems beyond doubt. Severance of the tombstone provision would not, in our view, significantly interfere with the central thrust of Article 17-A—to limit cigarette advertising in areas where young people are likely to congregate. This conclusion is reinforced by the City Council's inclusion of an express severability clause indicating its general desire to salvage any valid portions of the ordinance in the event that another portion is adjudged invalid. *See National Adver. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (New York law) (noting that "[t]he preference for severance is particularly strong when the law contains a severability clause").

We conclude, therefore, that while the tombstone provision of Article 17-A is preempted by § 1334(b), the remaining provisions of the ordinance are valid and enforceable.

II. *First Amendment*

The parties urge us to decide whether Article 17-A unduly restricts commercial speech in violation of the First Amendment. However, because the district court granted summary judgment to the Advertisers on preemption grounds alone, it did not pass upon the merits of the First Amendment claim. In our view, the district court should have the opportunity to consider this issue in the first instance. *See Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1110 (2d Cir. 1992). We remand so that it may do so.

CONCLUSION

We have considered the parties' remaining contentions and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court insofar as it held that the tombstone provision of Article 17-A is pre-empted under the FCLAA, REVERSE insofar as it held that the remaining provisions of Article 17-A are pre-empted, and REMAND for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Argued March 6, 1995
Decided Aug. 31, 1995
No. 94-2141

PENN ADVERTISING OF BALTIMORE INCORPORATED,

Plaintiff-Appellant,

—v.—

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; Kurt L. Schmoke, in his official capacity as Mayor of Baltimore City; David Tanner, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

The American Advertising Federation; the American Association of Advertising Agencies; the Association of National Advertisers, Incorporated; the Outdoor Advertising Association of America, Incorporated; Washington Legal Foundation; the City of Cincinnati, Ohio; the Maryland Congress of Parents & Teachers, Incorporated; the Coalition for Beautiful Neighborhoods; Baltimore City Wide Liquor Coalition for Better Laws and Regulations; City and County of San Francisco; City of San Jose,

Amici Curiae.

ARGUED: Eric Michael Rubin, Rubin, Winston, Diercks, Harris & Cooke, Washington, DC, for appellant. Burton Harry Levin, Assistant Solicitor, Baltimore, MD, for appellees. ON BRIEF: Walter E. Diercks, Jeffrey Harris, Rubin, Winston, Diercks, Harris & Cooke, Washington, DC, for appellant. Neal M. Janey, City Solicitor, Sandra R. Gutman, Associate Solicitor, Department of Law, Baltimore, MD, for appellees. Richard E. Wiley, Lawrence W. Secrest, III, Daniel E. Troy, Luis de la Torre, Frank Winston, Jr., Wiley, Rein & Fielding, Washington, DC, for amici curiae American Advertising Federation, et al. Mark S. Yurick, Senior Assistant City Solicitor, Office of the City Solicitor, Cincinnati, OH, for amicus curiae City of Cincinnati. Daniel J. Popeo, Richard A. Samp, Washington Legal Foundation, Washington, DC, for amicus curiae Washington Legal Foundation. Donald Garner, Professor of Law, Southern Illinois University, Carbondale, IL; the Maryland Congress of Parents & Teachers, Inc., Baltimore, MD, for amicus curiae Maryland Congress. Christopher J. Fritz, Julie Ellen Squire, Thomas C. Dame, Gallagher, Evelius & Jones, Baltimore, MD, for amici curiae Coalition for Beautiful Neighborhoods, et al. Louise H. Renne, City Attorney, Dannis Aftergut, Chief Assistant City Attorney, Barbara Solomon, Deputy City Attorney, John Cooper, Deputy City Attorney, San Francisco, CA, for amicus curiae San Francisco; Joan Gallo, City Attorney, George Rios, Assistant City Attorney, San Jose, CA, for amicus curiae San Jose.

Before NIEMEYER and HAMILTON, *Circuit Judges*, and BUTZNER, *Senior Circuit Judge*.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

OPINION

NIEMEYER, *Circuit Judge*:

We must decide in this case (1) whether Ordinance 307 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor, "advertising that advertises cigarettes" in certain areas of the City, is preempted by the Federal Cigarette Labeling and Advertising Act or by Maryland statutes prohibiting the sale of cigarettes to minors or the possession of cigarettes by minors; and (2) whether that ordinance violates the First and Fourteenth Amendment protections of commercial speech. The district court, granting Baltimore's motion for summary judgment, ruled that neither federal nor state law preempts the operation of Baltimore's ordinance and that the ordinance is a permissible regulation of commercial speech under the four-part test announced in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 US. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). We affirm.

I

Even before 1994, it was illegal in Maryland for any person to purchase cigarettes for, or sell them to, "any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). In 1994, Maryland also enacted statutes, effective October 1, 1994, prohibiting minors from using or possessing "any tobacco product." Md.Ann.Code art. 27, §§ 404 & 405A (Supp.1994). A few months earlier, in April 1994, the Mayor and City Council of Baltimore (collectively "Baltimore"), in a further effort to reduce the illegal consumption of cigarettes by minors, enacted Ordinance 307. The ordinance prohibits the placement of any sign that "advertises cigarettes in a publicly visible location," *i.e.* on "outdoor billboards, sides of building[s], and free standing signboards."[1] The prohibition

[1] The core provision of Ordinance 307 provides:

> Cigarette advertisements. No person may place any sign, poster, placard, device, graphic display, or other form of advertising

contained in Ordinance 307 parallels the scope and language of Baltimore City Ordinance 288, enacted in January 1994, which regulates the advertising of alcoholic beverages. Thus, the prohibition against cigarette advertising in Ordinance 307 mirrors Ordinance 288's exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contains an exception permitting such advertising in certain commercially and industrially zoned areas of the City.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously-conducted studies detailing the correlation between cigarette advertising and the consumption of cigarettes by minors. The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position. The City Council also relied on the 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education to support its conclusion that cigarettes are the second most commonly abused substance by Maryland adolescents, with approximately 42% of twelfth graders and 11% of sixth graders having smoked cigarettes in the previous 12 months. The City Council emphasized further that 75% of twelfth graders had smoked cigarettes before the age of 15. It noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear[ ] to 'open the door' for use of other

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that advertises cigarettes in a publicly visible location. In this section "publicly visible location" includes outdoor billboards, sides of building[s], and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(I). By its terms, the ordinance became effective April 6, 1994.

harder drugs at a later date." Therefore, to reduce the illegal consumption of cigarettes by minors, the City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements in the City.

On April 6, 1994, the date on which Ordinance 307 became effective, Penn Advertising of Baltimore, Inc., filed suit in federal court to enjoin the ordinance's enforcement and to obtain a declaratory judgment (1) that the ordinance is preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), and by Maryland statutes regulating the sale of cigarettes, and (2) that the ordinance violates the First and Fourteenth Amendments. Penn Advertising, which leases land from private property owners, maintains outdoor signs on those locations, and rents them to its customers, filed suit to protect its business of placing cigarette advertisements on outdoor signs located in Baltimore.

With its complaint, Penn Advertising filed a motion for a preliminary injunction to enjoin, pending litigation, enforcement of Ordinance 307. In response, Baltimore filed a motion to dismiss or, in the alternative, for summary judgment. While Penn Advertising obtained some discovery following the filing of these motions, it desired to conduct more discovery and thus filed a motion to extend the time to file its opposition to Baltimore's summary judgment motion. The district court denied the motion and established a briefing schedule for the parties. The court also entered an order staying enforcement of the ordinance.

On August 15, 1994, the district court filed a memorandum opinion granting Baltimore's motion for summary judgment. The district court concluded that Ordinance 307 is preempted neither by the Federal Cigarette Labeling and Advertising Act nor by Maryland state law. On the First Amendment issue, the court concluded that Ordinance 307 satisfied all four prongs of the *Central Hudson* test and was thus a permissible regulation of commercial speech. This appeal followed.[2]

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[2] Amici curiae briefs were received in this appeal from the American Advertising Federation, the American Association of Advertising

II

We address first a preliminary contention that the district court abused its discretion in refusing to extend Penn Advertising's time to conduct discovery and respond to Baltimore's motion for summary judgment. Penn Advertising argues that the court granted summary judgment "before there had even been adequate time for Penn Advertising to assemble a full evidentiatry record and after denying Penn Advertising's motion for leave to take discovery for the purpose of further establishing the disputed factual record."

While the district court granted Penn Advertising a short extension to respond to the motion for summary judgment, it did not generally open up the case for discovery before ruling on the issues. It concluded that such discovery was not necessary in view of the nature of the issues presented. The district court stated that the question presented are "legal questions ripe for decision" because the case concerns "a facial attack on the legal sufficiency of an ordinance." *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 862 F.Supp. 1402, 1405 (D.Md.1994). Penn Advertising nonetheless was able to oppose the motion for summary judgment with affidavits, various studies, and samples of advertising, and has failed to identify any further materials or theories which it desired, but was unable, to present to the district court.

We agree that the issues presented to the district court were questions of law which could be resolved without further development of the factual record. The preemption issue rests on a legal interpretation of the federal statute which allegedly preempts the ordinance. As the Supreme Court

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Agencies, the Association of National Advertisers, Inc., the Outdoor Advertising Association of America, Inc., the Washington Legal Foundation, the Maryland Congress of Parents & Teachers, Inc., the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, the City of Cincinnati, the City and County of San Francisco, and the City of San Jose.

noted in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." Our interpretation of the instant issue as involving solely a question of law is also consistent with the procedural posture of the *Cipollone* case before the Supreme Court, *i.e.* on review of a motion under Federal Rule of Civil Procedure 12(f) to strike the preemption defense as a matter of law.

Furthermore, we agree with the district court that a facial challenge to an ordinance restricting commercial speech may be resolved as a question of law when the government meets the burden placed on it by *Central Hudson*. We decided the same question in the companion case of *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir.1995), where we stated:

> [I]n response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

63 F.3d at 1311. The determinative question in reviewing a facial challenge to an ordinance thus is whether the legislative body acted with the objectively reasonable belief that the means it selected fit the objective sought. The issue is not whether the substantive findings on which it relied are incontrovertibly true. As we explained in *Anheuser-Busch*:

> While a party [facially] challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other.

63 F.3d at 1312.

Since the burden of justifying the ordinance falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or common sense, an understanding of the ordinance's factual impact on particular parties is not necessary to the inquiry. *Id.*, 63 F.3d at 1311-12. Accordingly, we conclude that the district court did not abuse its discretion in this case by ruling on the summary judgment motion without allowing further discovery.

III

Penn Advertising contends that Ordinance 307 is void because Baltimore's authority to enact such a measure was preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, which provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). That Act mandates that one of several specified warning messages be placed on each package of cigarettes and prohibits cigarette advertising on television and radio. *See* 15 U.S.C. §§ 1331-1340. Penn Advertising argues that since Ordinance 307's prohibition of cigarette advertising is "based on smoking and health," it is preempted by the

federal statute. Its argument rests entirely on the analysis of § 5(b) of the federal act conducted by the Supreme Court in *Cipollone v. Liggett Group, Inc.*

The lawsuit in *Cipollone* was predicated on the smoking-related death of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984. Her son sought damages from cigarette manufacturers, contending that cigarette smoke caused his mother's death. His suit, based on New Jersey common law, alleged common law claims involving design defects; failure to warn; breach of express warranty; fraudulent misrepresentation; conspiracy to defraud; and negligence in the manner in which cigarettes were tested, researched, sold, promoted and advertised. On the cigarette manufacturers' contention that Cipollone's claims were preempted by the Federal Cigarette Labeling and Advertising Act, the Supreme Court held:

> [T]he 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

505 U.S. at 530-31, 112 S.Ct. at 2625. To reach this conclusion, the Court conducted a count-by-count analysis of the common law claims to determine whether each claim implicated duties to warn or to label in connection with smoking and health. The Court explained:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact preempted.

Id. at 523, 112 S.Ct. at 2621. To sort out those claims that were preempted, the Court stated:

> The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition *based on smoking and health . . . imposed under state law with respect to . . . advertising* or promotion," giving that clause a fair but narrow reading.

Id. at 523-24, 112 S.Ct. at 2621 (emphasis added). The Court went on to clarify that the appropriate inquiry is "not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at 525, 112 S.Ct. at 2622. *See also Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73-74 (2d Cir.1994) (holding that Federal Cigarette Labeling and Advertising Act preempts ordinance requiring city-licensed facilities to display one message addressing the dangers of smoking for every four tobacco advertisements displayed).

Applying the methodology described in *Cipollone* to Ordinance 307, we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*. Moreover, the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media. The regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated. A regulation with such a general relationship to cigarette smoking—in contrast to a specific advertising "prohibition based on smoking and health"—is not preempted by the Federal Cigarette Labeling and Advertising Act. Were the preemption provision to be interpreted so broadly, the Supreme Court in *Cipollone* could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and

conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes. *See Cipollone*, 505 U.S. at 523-31, 112 S.Ct. at 2621-25.

For similar reasons, we conclude that the Maryland statutes prohibiting the sale of cigarettes to minors and the use and possession of cigarettes by minors, *see, e.g.*, Md.Ann.Code art. 27, §§ 404 & 405A (supp. 1994), and Md.Ann.Code, Business Regulation art., § 16-101 *et seq.*, do not preempt the City's ordinance. Penn Advertising argues that Ordinance 307 is invalid because it impliedly was preempted by these state statutes under the doctrine of "preemption by implication" set forth in *Allied Vending, Inc. v. Bowie*, 332 Md. 279, 631 A.2d 77 (1993). The court in *Allied Vending* explained that there may be times when " 'the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of preemption by occupation is compelled.' " *Id.* at 298, 631 A.2d 77 (quoting *Mayor and City Council of Baltimore v. Sitnick*, 254 Md. 303, 323, 255 A.2d 376 (1969)). The reasoning of *Allied Vending*, however, lends little support to Penn Advertising's claim. We can find nothing in §§ 404 and 405A of Article 27 or § 16-101 *et seq.* of the Business Regulation Article that indicates an attempt by the Maryland legislature to preempt the field of cigarette advertising. Moreover, Ordinance 307, which only limits the place and manner of cigarette advertising, is not in conflict with the state provisions prohibiting their sale to minors. For the reasons stated above, as well as those articulated by the district court in its well-reasoned opinion, *see Penn Advertising*, 862 F.Supp. at 1415-20, we reject the contention that Ordinance 307 is preempted and therefore null and void.

IV

Finally, Penn Advertising contends that Ordinance 307 is an impermissible regulation of commercial speech under the four-prong scheme announced in *Central Hudson*. As that case explains, in order for commercial speech to be entitled to

any First Amendment protection, the speech must first concern lawful activity and not be misleading. *See Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets those threshold criteria, a state may nevertheless regulate it if (2) the state is able to assert a substantial interest in support of the regulation; (3) the state demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) the regulation is not "more extensive than is necessary" to serve the interest. *Id.* at 566, 100 S.Ct. at 2351.

The governmental interest asserted in this case is to promote compliance with the state prohibition of the sale of cigarettes to minors. The district court concluded that the ordinance also furthers the obvious public policy underlying such a prohibition, "which is to prevent the purchase, and thus the consumption, of cigarettes by minors." *Penn Advertising*, 862 F.Supp. at 1406. In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest.

The principal dispute in this case centers on *Central Hudson's* third and fourth prongs which question whether Ordinance 307 directly advances Baltimore's stated public interest in reducing minors' cigarette consumption and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry under these two prongs of *Central Hudson* involves consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See United States v. Edge Broadcasting Co.*, — U.S. —, —, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986).

These same issues were resolved in favor of Baltimore in the related case of *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir.1995). In *Anheuser-Busch*, the City relied on

numerous studies that linked alcohol advertising to underage drinking to meet *Central Hudson*'s third prong. In response to Anheuser-Busch's challenge to those conclusions, we stated:

> There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

63 F.3d at 1314. Similarly, in our examination of whether the advertising regulation was narrowly tailored to meet *Central Hudson*'s fourth prong, we concluded in *Anheuser-Busch*:

> If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.

63 F.3d at 1316.

For the reasons advanced in *Anheuser-Busch*, we conclude here that, while the fit between the City's objectives and the means selected to achieve them may not be perfect, it never-

theless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
D.C. No. CV-97-05076-RJB
OPINION

JAMES R. LINDSEY; SUN CHA LINDSEY, and and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA-PIERCE COUNTY BOARD OF HEALTH; FEDERICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA, a municipal corporation,

Defendants.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
August 11, 1999—Seattle, Washington
Filed November 19, 1999

Before: William C. Canby, Jr., Melvin Brunetti,
and Diarmuid F. O'Scannlain, *Circuit Judges*.

Opinion by Judge Brunetti

COUNSEL

Floyd Abrams, Cahill Gordon & Reindel, New York, New York, for the plaintiffs-appellants.

Clifford D. Allo, Tacoma-Pierce City Health Department, Tacoma, Washington, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

In 1996, the Tacoma-Pierce County Health Department Board of Health adopted a resolution that bans outdoor tobacco advertising within Pierce County, Washington. The Board adopted the ban in an attempt to reduce underage tobacco use in the county. The Lindseys, owners of convenience stores who are licensed to sell tobacco products in the State of Washington, filed this action against the Board of Health and other defendants alleging that the Board's resolution was (1) an unconstitutional regulation of commercial speech under the First Amendment; (2) preempted by the Fed-

eral Cigarette Labeling and Advertising Act; (3) preempted by the Washington Tobacco Access to Minors Act; and (4) beyond the Board's statutory authority. The district court granted the Board's motion for summary judgment and entered a judgment in its favor. The Lindseys appeal from the district court's final judgment in favor of the Board. We have jurisdiction under 28 U.S.C. § 1291 and reverse because a local ban on outdoor tobacco advertising is preempted by the Federal Cigarette Labeling and Advertising Act.

I.

James Lindsey and Sun Cha Lindsey—plaintiffs-appellants—are husband and wife and the owners of neighborhood convenience stores located in Tacoma, Washington. The Lindseys hold a cigarette retailers' license issued by the State of Washington and sell cigarettes and other tobacco products at their stores. Prior to March 1, 1997, the Lindseys displayed tobacco advertisements inside and outside their stores and received compensation from tobacco companies based on the volume of their tobacco sales, their participation in promotional programs, and their utilization of brand advertisements. On March 1, 1997, the Tacoma-Pierce County Health Department Board of Health's Resolution No. 96-1997 went into effect banning all "outdoor advertising of tobacco and tobacco products . . . within the jurisdiction of the Tacoma-Pierce County Health Department Board of Health." As a result of the Board's resolution, the Lindseys were forced to discontinue their use of outdoor tobacco advertisements.

The Tacoma-Pierce County Health Department Board of Health ("Board")—defendant-appellee—is a combined city-county health department created by the City of Tacoma and Pierce County. Under the Washington Revised Code, the Board has the authority to "[e]nact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof." Wash. Rev. Code § 70.05.060. Pursuant to this

authority, the Board adopted Resolution No. 96-1997, the Truth in Outdoor Tobacco Advertising Regulation ("Resolution"), on December 4, 1996, banning outdoor tobacco advertising in Pierce County.

The Board justified its adoption of the Resolution based on its findings that "[t]obacco advertising, whether intended to promote tobacco use or only compete for market share, has the consequence of promoting tobacco use" and that "[t]obacco advertising induces children to initiate tobacco use." The Board specifically targeted all outdoor tobacco advertisements because it believed that outdoor advertisements intrude into public spaces and induce minors to use tobacco. The Board, therefore, banned all tobacco advertisements that can be seen from the street unless the advertisements are presented in a tombstone format.

Under the Resolution's tombstone exception, licensed tobacco retailers can post price and availability information outside their businesses so long as the advertisements are in plain black type on a white field without adornment, color, opinion, artwork, or logos. The Resolution does not otherwise regulate the content of tobacco advertisements. No tombstone advertisement can be displayed, however, if it is visible from a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school or within one thousand feet of a school, playground, or public park. The Resolution does not regulate tobacco advertisements located inside retail establishments unless the advertisements can be seen from the street. A retailer who violates the Resolution can be fined one hundred dollars per day for each advertisement that violates the regulation.

The Lindseys filed this action against the Board and various other defendants alleging that the Resolution is invalid because it is: (1) preempted by the Federal Cigarette Labeling and Advertising Act; (2) an unconstitutional regulation of commercial speech under the First Amendment of the United States Constitution; (3) preempted by Washington's Tobacco Access to Minors Act; and (4) an impermissible exercise of

legislative authority beyond the Board's statutory authority. The Lindseys and the Board filed cross-motions for summary judgment and partial summary judgment on the federal preemption, state preemption, and scope of authority claims. The district court, in a published order, denied the Lindseys' motion for summary judgment, granted the Board's motion for partial summary judgment, and dismissed the Lindseys' federal preemption, state preemption, and scope of authority claims. *See Lindsey v. Tacoma-Pierce County Health Dep't*, 8 F. Supp. 2d 1213 (W.D. Wash. 1997). The district court reasoned that: (1) the Resolution was not preempted by the Federal Cigarette Labeling and Advertising Act because the Resolution only regulates the location and not the content of cigarette advertisements; (2) the Resolution was not preempted by state law because the Resolution does not directly regulate indoor advertising; and (3) the Board did not exceed its authority when it adopted the Resolution because the Resolution is reasonably related to the Board's authority to enact regulations that promote and improve public health.

The Lindseys and the Board subsequently filed another round of summary judgment motions on the Lindseys' First Amendment claim. The district court, in another published order, denied the Lindseys' motion, granted the Board's motion, and dismissed the Lindseys' First Amendment claim concluding that the Resolution was a constitutional regulation of commercial speech under *Central Hudson*. *See Lindsey v. Tacoma-Pierce County Health Dep't*, 8 F. Supp. 2d 1225, 1226 (W.D. Wash. 1998). The district court reasoned that the Resolution was constitutional because it was sufficiently related to its purpose of reducing underage tobacco use and because non-speech alternatives to the regulation did not exist. The Lindseys appeal from the district court's final judgment entered in favor of the Board. We have jurisdiction under 28 U.S.C. § 1291 and now reverse.

II.

We review a grant of summary judgment de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Margolis*, 140 F.3d at 852; *Bagdadi*, 84 F.3d at 1197. In regard to the relevant substantive law at issue in this case, a district court's decision regarding federal preemption is reviewed de novo, *see Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998), as is a district court's interpretation and construction of a federal statute. *See Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998); *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir. 1998).

III.

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Issues of federal preemption arising under the Supremacy Clause, however, "start with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congressional intent is, therefore, the " 'ultimate touchstone' of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actu-

ally conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in the legislative field. *See Cipollone*, 505 U.S. at 516. When, however, Congress considers the issue of preemption and adopts a preemption statute that provides a reliable indication of its intent regarding preemption, the scope of federal preemption is determined by the preemption statute and not by the substantive provisions of the legislation. *See id.* at 517. The reason is that "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* Because Congress adopted an explicit preemption statute when it enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA") that provides a reliable indication of Congress' intent regarding preemption, the federal preemption issue in this case is "governed entirely by the express language" of the FCLAA's preemption statute. *Cipollone*, 505 U.S. at 517.

A.

After a Surgeon General's advisory committee reported in 1964 that cigarette smoking is a health hazard, the Federal Trade Commission ("FTC") promulgated a trade regulation that would have required tobacco companies " 'to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container of cigarettes that cigarette smoking is dangerous to health and may cause death from cancer and other diseases.' " *Cipollone*, 505 U.S. at 513 (quoting 29 Fed. Reg. 8325 (1964)). In addition to the FTC, a number of states also acted in response to the advisory committee's report and considered regulating the labeling and advertising of cigarettes. *See id.* With the prospect of diverse, nonuniform, and confusing cigarette labeling and advertising regulations looming over the tobacco industry, Congress enacted the FCLAA in 1965 to adequately inform the public about the health hazards of smoking and to protect the national econ-

omy from the burdens of diverse regulations related to cigarette advertising and labeling. *See id.* at 514; *see also* 15 U.S.C. § 1331.

To inform the public about the possible dangers of smoking, the FCLAA required that all cigarette packages contain a conspicuous warning label stating: "Caution: Cigarette Smoking May Be Hazardous To Your Health." *Cipollone*, 505 U.S. at 514 (internal quotations omitted). To prevent diverse regulations, the FCLAA preempted advertising and labeling regulations related to smoking and health. The FCLAA's preemption provisions provided:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id. at 514. The FCLAA also contained a termination provision which stated that the FCLAA's advertising regulations would terminate on July 1, 1969. *See id.*

As July 1, 1969, approached, the FTC, Federal Communications Commission, and several states again contemplated the regulation of tobacco advertising and labeling. For the same reasons that Congress originally adopted the FCLAA in 1965, Congress amended the FCLAA by enacting the Public Health Cigarette Smoking Act of 1969 ("PHCSA"). The PHCSA, in relevant part, expanded the scope of the FCLAA's preemption provisions. Since the adoption of the PHCSA in 1969, the FCLAA's preemption statutes have provided:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to

> the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.

The plain language of the FCLAA preempts any state law that imposes a requirement or prohibition based on smoking and health with respect to cigarette advertising. *See Cipollone*, 505 U.S. at 523-24; *see also Vango Media, Inc. v. City of New York*, 34 F.3d 68, 72 (2d Cir. 1994) ("We need only determine whether the Local Law impose[s] a requirement or prohibition based on smoking and health with respect to the advertising or promotion of any cigarettes.") (internal quotations and ellipses omitted). The Board's resolution banning outdoor tobacco advertising in Pierce County is preempted by the express language of the FCLAA because the resolution imposes a requirement or prohibition based on smoking and health with respect to cigarette advertising.

The Resolution is a requirement or prohibition because the phrase "requirement or prohibition" encompasses positive enactments adopted by political subdivisions, *see Cipollone*, 505 U.S. at 521; *Vango Media*, 34 F.3d at 72-73, and because the Resolution expressly prohibits outdoor tobacco advertising in Pierce County. The Resolution also imposes a requirement on cigarette advertising because it requires availability advertisements to be printed in a legislatively defined tombstone format—"plain black type on a white field without adornment and unaccompanied by color, opinion, artwork, or logos." The Resolution is based on smoking and health because, in the words of the Board, it "pertains to matters of health and safety of the citizens of Pierce County." In fact, the findings which are included in the Resolution to justify the Board's ban on outdoor tobacco advertising almost exclusively refer to the various health risks that are related to cigarette smoking. Finally, the Resolution is a requirement or prohibition with respect to cigarette advertising because the Resolution expressly prohibits outdoor tobacco advertisements and regulates point of sale availability information. The

Resolution is, therefore, preempted by the clear and express language of the FCLAA because it creates a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b).

B.

The Board does not contend that the plain language of the FCLAA fails to preempt its ban on outdoor tobacco advertisements. Rather, the Board attempts to evade the express language of the FCLAA's preemption provision by citing to the Fourth Circuit's opinion in *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *affirmed on remand*, 101 F.3d 332 (4th Cir. 1996), and arguing that the FCLAA does not preempt its resolution because the FCLAA only preempts local laws that regulate the content rather than the location of cigarette advertisements. We find the Board's argument and the Fourth Circuit's decision in *Penn Advertising* unpersuasive, and we decline to follow the reasoning of our sister circuit because it ignores the history, purpose, and language of the FCLAA and is not supported by Supreme Court precedent.

Penn Advertising addressed the issue of whether a city ordinance that prohibits the placement of any sign advertising cigarettes in a publicly visible location was preempted by the FCLAA (*see id.* at 1320-21), and concluded that such an ordinance was not preempted by the FCLAA because an ordinance which regulates the location rather than the content of cigarette advertisements is not based on smoking and health. *Penn Advertising* relied on the Supreme Court's decision in *Cipollone* and reasoned that if the FCLAA did not preempt the common law warranty, misrepresentation, fraud, and conspiracy claims filed in *Cipollone*, the FCLAA did not preempt the City of Baltimore's general ban on publicly visible tobacco advertisements.

Penn Advertising misconstrues *Cipollone* when it concludes that content regulations can be distinguished from location regulations under the FCLAA because *Cipollone* does not support such a distinction. In *Cipollone*, the Court had to determine whether state common law actions filed against tobacco companies for failure to warn, breach of warranty, fraudulent misrepresentation, and conspiracy were preempted by the FCLAA. *See Cipollone*, 505 U.S. at 508-09. A plurality of the Court addressed each common law claim individually stating that *"[t]he central inquiry* in each case *is straightforward*: we ask whether the legal duty that is the predicate of the common-law damages action *constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'* giving that clause a fair but narrow reading." *Id.* at 523-24 (Stevens, J., plurality) (emphasis added). The plurality opinion expressly recognized that the plain language of the FCLAA is determinative to resolving preemption issues regarding tobacco advertising.

The plurality held that failure to warn claims were preempted by the FCLAA to the extent that such claims required a plaintiff to show that tobacco advertisements should have included additional or more clearly stated health warnings. *See id.* at 524-25. The plurality reasoned that such failure to warn claims were preempted because they relied on "a state-law requirement or prohibition . . . with respect to . . . advertising or promotion." *Id.* at 524. The plurality noted, however, that failure to warn claims based on negligent testing and research practices were not preempted by the FCLAA because such claims were unrelated to advertising and promotional practices. *See id.* at 524-25.

The plurality concluded that express warranty claims were not preempted by the FCLAA because liability for express warranty is imposed not under state law but by the warrantor's express actions. *See id.* at 525-27. The plurality also concluded that the FCLAA does not preempt fraudulent misrepresentation claims because fraudulent misrepresentation

claims are based on a state law duty not to deceive rather than a state law duty "based on smoking and health." *See id.* at 528-29. Likewise, the plurality concluded that the FCLAA does not preempt conspiracy to defraud claims because such claims are based on a duty not to conspire to commit fraud rather than a duty "based on smoking and health." *See id.* at 530. The *Cipollone* plurality always examined the plain language of the FCLAA to determine preemption issues and never recognized a distinction between content regulations and other regulations like location regulations. The Board's argument and the Fourth Circuit's conclusion that location regulations are distinguishable from content regulations under the FCLAA are, therefore, not supported by the plurality decision in *Cipollone*.

In two recent cases, the Second and Seventh Circuits held that a ban on outdoor advertising is not preempted by the FCLAA. *See Greater New York Metro. Food Council, Inc. v. Giuliani*, No. 99-7006, 1999 WL 965691, at *6 (2d Cir. Oct. 25, 1999); *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 639 (7th Cir. 1999) ("*FAIR*"). Both of these cases draw a distinction between location and content regulations by holding that certain bans on outdoor advertising are not preempted, while finding that a tombstone requirement is preempted.[1]

Recognizing that the text of the FCLAA preemption provision does not support the artificial distinction between content and location restrictions, both decisions turn to the Congressional purpose behind the FCLAA preemption statute

[1] The tombstone provisions at issue in *Giuliani* and *FAIR* were slightly different, although both tombstone provisions were struck down on the basis that they were content restrictions imposed upon tobacco advertising. *See Giuliani*, 1999 WL 965691, at *6; *FAIR*, 189 F.3d at 640. In *Giuliani*, a tobacco advertiser could place only "a single, black and white, text-only 'tombstone' sign stating, 'TOBACCO PRODUCTS SOLD HERE'" within ten feet of an entrance to a store where tobacco products are sold. *Giuliani*, 1999 WL 965691, at *1. The tombstone provision in *FAIR* allowed only a "generic, as opposed to brand-specific, mention of a tobacco product." *FAIR*, 189 F.3d at 640.

for support. *See Giuliani*, 1999 WL 965691, at *2; *FAIR*, 189 F.3d at 637. Specifically, they recognize that the Congressional purpose behind the FCLAA preemption statute was "an effort to avoid the chaos of multiple diverse regulations" in tobacco advertising. *Giuliani*, 1999 WL 965691, at *4 (quoting *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 70 (2d Cir. 1994)); *see also FAIR*, 189 F.3d at 638. However, both decisions conclude that location restrictions do not lead to the "diverse, nonuniform, and confusing" advertising standards that Congress aimed to prevent by promulgating the FCLAA preemption statute. *See Giuliani*, 1999 WL 965691, at *4; *FAIR*, 189 F.3d at 639.

The distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 1334(b) supports the preemption of a ban on outdoor tobacco advertising. As noted in *Giuliani*, advertisers are forced to comply with diverse local zoning laws; however, this fact does not justify placing additional restrictions solely on tobacco advertisers. Rather, the failure to preempt location restrictions on tobacco advertising will place an unjustifiable burden upon a tobacco advertiser to consult local regulations concerning the placement of tobacco advertisements in every locality in which it wishes to advertise. The bans on outdoor advertising in *FAIR*, *Giuliani*, and this case present a good example of the multitude of different regulations tobacco advertisers face. The ban in *Giuliani* prevents any tobacco advertising (other than tobacco advertisements on motor vehicles) within a 1000 foot buffer zone around a school building, playground, child day care center, or youth center. *See Giuliani*, 1999 WL 682015, at *1. In contrast, the Chicago ordinance at issue in *FAIR* bans all public advertising of tobacco advertising, but carves out numerous broad exceptions including "signs located near highways, signs in certain commercial and manufacturing zoning areas, signs at certain sports facilities, signs inside a store that is licensed to sell alcohol and cigarette products, signs on commercial vehicles transporting such products, and signs iden-

tifying the premises upon which such products are sold." *FAIR*, 189 F.3d at 639. Finally, the Tacoma-Pierce County regulation in this case constitutes a complete ban on all outdoor advertising, except those advertisements that meet a tombstone exception. Thus, a tobacco advertiser is faced with diverse and nonuniform tobacco advertising regulations depending solely upon the politics of the locality of the advertising. This is precisely the result Congress was trying to avoid in promulgating § 1334(b).

The structure and history of § 1334(b) support our view that a local ban on outdoor advertising is preempted by the FCLAA. Although we recognize that there is some ambiguity in the FCLAA's legislative history, *see Cipollone*, 505 U.S. at 521, the structure and history of the FCLAA do not unambiguously support the positions taken by *Giuliani* and *FAIR*; rather, the structure and history of the FCLAA support preemption and there is no reason to depart from the plain language of § 1334(b). *See Cipollone*, 505 U.S. at 521-22 (" 'We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.' ") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *Vango Media*, 34 F.3d at 73 ("[W]e rely on an express preemption analysis in which focus remains on the language Congress used in § 1334(b).").

The statutory text of the FCLAA is the starting point for preemption analysis under § 1334. *See Cipollone*, 505 U.S. at 521-22; *see also id.* at 532 (Blackmun, J., concurring in part and dissenting in part) ("An interpreting court must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal quotation marks omitted); *id.* at 548 (Scalia, J., concurring in part and dissenting in part) ("The proper rule of construction for express preemption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning."). "[T]here is no 'good reason to believe' that Congress meant less than what it said;

indeed, in light of the narrowness of the 1965 Act, there is 'good reason to believe' that Congress meant precisely what it said in amending that Act." *Id.* at 522. The Supreme Court reiterated its emphasis on giving effect to the plain language of statutory text in a recent Medical Device Amendments (MDA) case, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). In *Medtronic*, the Court again stated that "the scope of [a] preemption statute must begin with its text . . . ." *Id.* at 484-85.

Despite the holdings of *Penn Advertising*, *FAIR*, and *Giuliani*, the text of the FCLAA's preemption provision clearly preempts a ban on outdoor advertising because such a ban constitutes a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b).

C.

The language, structure, and history of the FCLAA also support the conclusion that location regulations directed at cigarette advertising cannot be distinguished from content regulations under the FCLAA. The original 1965 preemption statute provided: "No *statement* relating to smoking and health shall be required *in the advertising* of any cigarettes . . . ." The current preemption statute provides: "No *requirement or prohibition* based on smoking and health shall be imposed under State law *with respect to the advertising or promotion* of any cigarettes . . . ."

As the plurality in *Cipollone* stated:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply 'statements' but rather 'requirements or prohibitions imposed under State law.' Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes.

Cipollone, 505 U.S. at 520. To give effect to the 1969 amendments, the distinction between content regulations and location regulations cannot now be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements. *See id.* at 519-20 ("[T]he 1965 Act only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements.").

The impact of the 1969 amendments on the FCLAA's preemptive scope is further demonstrated by an examination of the FCLAA's other preemption provision. The FCLAA's first preemption provision was not amended in 1969 and still provides that "[n]o *statement* relating to smoking and health . . . shall be required *on* any cigarette package." 15 U.S.C. § 1334(a) (emphasis added). The second preemption provision is at issue in this case and provides that "no *requirement or prohibition* based on smoking and health shall be imposed . . . *with respect* to the advertising or promotion of . . . cigarettes." 15 U.S.C. § 1334(b) (emphasis added).

In order to distinguish the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read as preempting more than just content regulations. The language used in § 1334(a) is focused on content regulations because it narrowly preempts statements related to smoking and health on cigarette packages, but the language of § 1334(b) is not focused on content because it broadly preempts requirements and prohibitions based on smoking and health with respect to advertisements. If we were to accept the Board's content-location distinction we would be forced to give "requirement or prohibition" in subsection (b) essentially the same meaning as "statement" in subsection (a), thereby ignoring the basic principle of statutory construction that different words in the same statute must be given different meanings. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a

whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.") (citing Sutherland Stat. Const. §§ 46.05, 46.06 (4th ed. 1984)). Accordingly, the language, history, and structure of § 1334(b) demonstrate, contrary to the Board's position, that the FCLAA and § 1334(b) preempt more than just regulations affecting the content of cigarette advertisements.

D.

Finally, the conclusion that the Resolution is preempted by the FCLAA advances the legislative policies that underlie the federal act. When Congress enacted the FCLAA it declared:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> . . .
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. If every board of health, city, county, and state in this country regulated the location of tobacco advertisements and prescribed certain tombstone formats for availability information signs like the Board has in this case, the purpose of the FCLAA would be frustrated because the national economy would be impeded by diverse, nonuniform, and confusing cigarette advertising regulations. The conclusion that the Resolution is preempted by the FCLAA is, therefore, not only mandated by the language of the statute but

also consistent with the legislative goals that spawned the FCLAA's enactment in 1965 and subsequent expansion in 1969.

IV.

In a final effort to save its resolution from preemption, the Board asserts two arguments that are unrelated to the language or purpose of the FCLAA. First, the Board argues that state and local governments can regulate and ban outdoor tobacco advertising under *Packer Corp. v. Utah*, 285 U.S. 105 (1932). Second, the Board argues that Congress exceeded its authority under the commerce clause when it preempted local regulation of wholly intrastate tobacco advertising. These final arguments are meritless.

Although the Court in *Packer* upheld Utah's statewide ban on outdoor tobacco advertising, *Packer* is inapplicable to this case because it pre-dates the enactment of the FCLAA and addresses issues irrelevant to this appeal. The specific issues in *Packer* were whether a statewide ban on outdoor tobacco advertisements that left print advertisements unregulated violated the equal protection clause by creating an arbitrary classification, impermissibly took advertisers' property without due process of law by limiting the freedom of contract, or constituted an impermissible state regulation of interstate commerce. *See Packer*, 285 U.S. at 109-12. *Packer* does not address or limit Congress' power to preempt local regulation of tobacco advertising or stand for the broad proposition that local governments have an inherent and undeniable right to regulate tobacco advertising. *Packer* simply instructs that in the *absence of federal regulations*, local governments can regulate tobacco advertising in general and ban outdoor tobacco advertising in particular.

The Board's argument that Congress cannot preempt local regulation of tobacco advertising that is wholly intrastate under the commerce clause is also meritless because Congress can regulate activities that are wholly intrastate if the activ-

ities have a substantial effect on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 555-56 (1995). It is beyond dispute that intrastate tobacco advertising has a substantial effect on interstate commerce because, as the Board itself recognizes, the tobacco industry spends nearly $5 billion annually on marketing campaigns. Congress was, therefore, well within its powers under the commerce clause when it enacted the FCLAA's preemption provisions.

V.

Because the Resolution is a requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes and because content regulations are indistinguishable from location regulations under the language and purpose of the FCLAA, the district court erred when it concluded that the FCLAA does not preempt the Resolution. We, therefore, reverse the district court's judgment in favor of the Board, hold that the Resolution is preempted by the FCLAA, and grant the Lindseys' motion for summary judgment on their federal preemption claim. Because the Resolution is preempted by the FCLAA, we decline to address the remaining issues raised on appeal.

REVERSED.

Supreme Court, U.S.
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No. 99-1172

In the Supreme Court of the United States

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MARA S. GEORGES
Corporation Counsel
of the City of Chicago

LAWRENCE ROSENTHAL*
Deputy Corporation Counsel

BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel

MARDELL NEREIM
Assistant Corporation Counsel
30 North LaSalle Street, Room 800
Chicago, Illinois 60602
(312) 744-5337

*Counsel of Record

Attorneys for Respondent

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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QUESTION PRESENTED

Whether a Chicago ordinance limiting the placement of publicly visible signs advertising cigarettes to locations relatively less accessible to minors as a means of reducing the illegal use of cigarettes by minors is preempted by section 5(b) of the Federal Cigarette Labeling and Advertising Act, which provides that state and local governments may impose no "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes . . . ."

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STATEMENT

On September 10, 1997, the Chicago City Council enacted an ordinance regulating the location of publicly visible signs advertising cigarettes and alcoholic beverages. R. 37, ¶ 1; R. 48, Ex. F; *see also* Chicago City Council, Journal of the Proceedings of the City Council of the City of Chicago, Sept. 10, 1997, at 52332-35. The ordinance prohibits publicly visible signs advertising cigarettes and alcoholic beverages with the following locational exceptions—at special events; on Chicago Transit Authority vehicles; on property used by the Illinois Sports Facilities Authority; at Comiskey Park, Soldier Field, the United Center, and Wrigley Field; on property adjacent to interstate highways; in districts zoned as commercial-manufacturing, manufacturing, or motor freight terminals; and generic signs on the premises of the holder of a license to sell cigarettes or alcoholic beverages. R. 38, Ex. A; R. 48, Ex. F.[1]

The Preamble to the ordinance finds:

> WHEREAS, Illinois law and the Municipal Code of Chicago make it unlawful for any individual under 18 years of age to purchase or be sold cigarettes, and make it unlawful for any individ-

---

[1] As originally enacted, the ordinance applied only to contracts executed after the effective date of the ordinance and to renewal terms of preexisting contracts beginning after the effective date of the ordinance. R. 38, Ex. A. On February 6, 1998, the ordinance was amended to apply to all signs, but allowed signs that had been in place before January 31, 1998 to remain in place until 180 days from the effective date of the ordinance. R. 38, Ex. B; R. 48, Ex. F.

ual under 21 years of age to purchase or be sold alcoholic liquor; and

WHEREAS, more than three million minors under the age of 18 consume more than 947 million packs of cigarettes annually in the United States, yielding gross sales to the tobacco industry each year of approximately $1 billion; and

WHEREAS, cigarettes are the most heavily advertised product in America, and the tobacco industry spends more than $421 million annually for outdoor advertising of cigarettes, and alcoholic beverages are the second most heavily advertised products in America, and the alcoholic beverage industry spends more than $100 million annually for outdoor advertising of its products; and

WHEREAS, outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as contrasted with, for example, newspapers, magazines, or radio; and

WHEREAS, the Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services; and

WHEREAS, in addition to judicial recognition of the general link between advertising and consumption, there is evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors, including articles in the *New England Journal*

of Medicine, American Journal of Public Health, Journal of Pediatrics, and other scientific journals, and research has also shown that children's attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements; and

WHEREAS, studies have shown that our nation's adolescents commonly use cigarettes, and that cigarettes constitute a "gateway" drug for these youth, i.e., a substance which is used by adolescents as a first drug and opens the door for use of other "harder" substances at a later date, and studies have also shown a strong correlation between alcohol use and juvenile crime, that a striking association exists between alcohol use and juvenile suicide by firearm, and that alcohol use by minors correlates with drowning accidents, diving accidents, and school truancy and damage to school property; and

WHEREAS, an ordinance restricting the placement of advertisements for cigarettes and alcoholic beverages in publicly visible locations within the City of Chicago is a reasonable and necessary measure for reducing illegal transactions and illegal consumption of cigarettes and alcoholic beverages by minors, and for the promotion of the welfare and temperance of minors exposed to such advertisements, and

WHEREAS, the restrictions contained in the following ordinance will not unduly burden legitimate business activities of persons licensed by the City of Chicago to sell cigarettes and alcoholic beverages on a retail basis; and

> WHEREAS, in order to protect legitimate business activities and to narrowly focus its efforts on those advertisements that most directly affect minors where they live, attend school, attend religious services and engage in recreational activities, the City Council has determined not to restrict advertisements of cigarettes or alcoholic beverages in certain areas hereinafter identified . . . .

R. 48, Ex. F.

Articles from the journals cited in the preamble were made part of the record before the City Council. *See* R. 10. Although the articles contain references to the health hazards of cigarettes, they focus on other matters as well, including the addictive character of cigarettes and their costs. *See* R. 47, ¶ 4. One article in the *New England Journal of Medicine* entitled "The Human Costs of Tobacco Use," was published in parts; the first part concerned health issues, *see* R. 10-2A at 56; the second discussed the costs and economic consequences of cigarettes, including a discussion of tobacco advertising and marketing, *id.* at 530-33. A second article in the *New England Journal of Medicine* is entitled "Current Trends in Cigarette Advertising and Marketing." R. 10-2A at 542. This article refers to the public health problem created by cigarettes, *see* R. 37, ¶ 4(c); R. 10-2A at 542-43, and discusses at length the extent and effect of cigarette advertising, R. 10-2A at 542-52, including a discussion of the effects of the advertisements on minors, *id.* at 550.

An article in the legislative record from the *American Journal of Public Health*, entitled "The Illegal Sale of Cigarettes to U.S. Minors, Estimates by States," con-

tains data concerning the extent of underage cigarette use in Illinois. R. 10-2A at 527-29. The article notes that "cigarette smoking kills more than 400,000 Americans each year," R. 37, ¶ 4(b); R. 10-2A at 527, but it primarily explains the methods and materials used to compile data on the sale of cigarettes to minors, which are set forth in a chart of estimated sales to minors in each state. R. 10-2A at 527-28. The chart estimates that 12.86 million packs of cigarettes were sold to minors in Illinois in 1991. *Id.* at 528.

The article before the City Council from the *Journal of Pediatrics* is entitled "Relationship Between High School Student Smoking and Recognition of Cigarette Advertisements." R. 10-2A at 523. The article published the results of a study described by the authors as having "[t]he purpose . . . to examine and verify the relationships between cigarette brand preference, advertising recall, and smoking level in a population of U.S. high school students." *Id.*

The City Council also heard from or considered written material submitted by both proponents and opponents of the ordinance. *See* R. 10-1 at 7-8; 15-364. A number of studies and reports were introduced into the record before the City Council. *See* R. 10-1, Aff. of Alderman Bernard Stone at ¶ 8; R. 10-2A, 10-2B. These included an abstract of the studies and reports entitled "Cigarette and Alcohol Facts," which listed, along with information on alcohol, statistics concerning the consumption of cigarettes by minors, information on outdoor advertising of cigarettes, information on the role of advertising in encouraging minors' use of cigarettes, and the correlation of cigarette use with other behavior. R. 10-2A at 228-33.

On October 30, 1997, petitioner filed a complaint seeking declaratory, injunctive, and other relief on the ground that the new ordinance was invalid under both the First Amendment, as well as preempted by section 5(b) of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b). R. 1-1. On July 29, 1998, the district court granted petitioner's motion for summary judgment on preemption, and enjoined the ordinance's enforcement. Pet. App. 14a-33a. The district court concluded that the ordinance's stated objective—to discourage smoking by minors—was itself a preempted "requirement or prohibition . . . based on smoking and health" within the meaning of section 5(b), because of its view that the Illinois statute that prohibits the sale of cigarettes to minors is itself premised on an interest in protecting the health of minors. On this point, the district court relied on an 1898 decision of the Illinois Supreme Court upholding an earlier version of the state statute prohibiting the sale of cigarettes to minors on the ground that it was a reasonable exercise of police power to protect the public health. See Pet. App. 26a-30a (citing *Gundling v. City of Chicago*, 176 Ill. 340, 52 N.E. 44 (1898), aff'd, 177 U.S. 183 (1900)).

The court of appeals reversed. To construe the preemptive effect of section 5(b), the court reasoned, it was required to "examine the congressional scheme and legislative history of § 5(b) in order to determine what Congress meant by this broad language." Pet. App. 7a. When doing so, the court added, it should presume that Congress does not intend to preempt state and local authority "in areas traditionally occupied by the historic police powers of the state." Pet. App. 8a. Moreover, the court added, the intent of Congress is properly discerned "from the language of the Act, the statutory

framework and the structure and purpose of the Act as a whole." *Ibid.* The court of appeals then identified two critical aspects of congressional intent reflected in the FCLAA's text, structure, and legislative history: first, that state and local governments not be permitted to mandate "diverse, nonuniform, and confusing cigarette labeling and advertising regulations," Pet. App. 9a (quoting 15 U.S.C. § 1331(2)(B)), and second, that Congress did not intend to preempt state or local authority to exercise "traditional police powers," including the power to protect minors, Pet. App. 10a. Given this underlying structure and purpose, the Chicago ordinance was not preempted, since it involved an exercise of the historic police power over zoning, and did not interfere with the congressional policy of requiring uniformity in cigarette labeling. See Pet. App. 10a-12a.[2]

ARGUMENT

A host of factors counsels against plenary review in this case. First and foremost, while petitioner claims that the decision below is inconsistent with a decision of the Ninth Circuit, that asserted conflict has yet to mature. The Ninth Circuit is currently considering rehearing in its case, which has in any event largely been resolved through an apparent settlement between the parties. Thus, it is unclear whether a majority of the Ninth Circuit will adhere to the panel opinion on which

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[2] The court of appeals found only the ordinance's exemption of generic advertising to be preempted since that exemption effectively treated advertising differently based upon its content. See Pet App. 12a. The court nevertheless found this one aspect of the ordinance to be severable from the valid remaining provisions in the ordinance. See Pet. App. 12a-13a.

petitioner relies, and it is equally unclear whether the case currently pending in that circuit, in light of its unusual posture, is an appropriate basis on which to conclude that a conflict in the circuits exists.

And regardless of the supposed conflict, this case is a poor vehicle for plenary review. Its importance has been vastly diminished by a settlement between the major tobacco producers and 46 states that provides for sweeping restrictions on cigarette advertising. This case is also in an interlocutory posture, with what petitioner considers to be significant First Amendment challenges to both the cigarette and the liquor advertising restrictions in the ordinance left to be adjudicated in the district court. Moreover, the decision below was eminently correct; it is fully supported by this Court's consistently cautious approach to preemption in areas that touch upon traditional state and local police powers.

1. The primary basis on which petitioner seeks plenary review is an asserted conflict in the circuits. As petitioner acknowledges, the decision below is consistent with the law in two other circuits. See *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3480 (Jan. 12, 2000) (No. 99-1171); *Penn Advertising, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), vacated and remanded, 518 U.S. 1030 (1996), reaffirmed as modified, 101 F.3d 332 (4th Cir. 1996), cert. denied, 520 U.S. 1204 (1997). Nevertheless, petitioner asserts a conflict between the decision below and the Ninth Circuit's subsequent decision in *Lindsey v. Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999). This claim is premature. As petitioner acknowledges, the Ninth Circuit, on its own mo-

tion, issued an order directing briefing on whether the case should be reheard en banc. See Pet. 8-9 n.5.

The status of *Lindsey* is further complicated because the parties to that case, subsequent to the Ninth Circuit's panel decision but prior to the issuance of the order directing briefing on whether the case should be reheard, had entered into an agreement that the county health department and the other defendants in the case "would not seek further review and the plaintiffs would not seek attorneys fees under 42 U.S.C. § 1983." Defendant-Appellees' Brief On Whether The Court Should Grant En Banc Review 4 n.15, *Lindsey v. Tacoma-Pierce County Health Department* (filed Jan. 18, 2000) (emphasis deleted). A review of the defendants' brief filed in response to the court's rehearing order discloses that the defendants construe their agreement to permit them to urge the court to rehear the case in response to the court's order, but it is unclear how the full Ninth Circuit will react to the partial settlement. The Ninth Circuit may well decide to hear another case presenting this issue en banc even if it decides not to rehear *Lindsey*; surely the court's sua sponte order in *Lindsey* indicates that there is considerable disquiet on the full court with the panel opinion. Given the unusual posture of the *Lindsey* case, then, it is quite unclear not only whether a majority of the Ninth Circuit is prepared to adhere to the panel's decision, but also whether the *Lindsey* case itself is an appropriate candidate for en banc review. Thus, petitioner's assertion that a conflict in the circuits has reached the point where this Court's review is warranted is premature, at best.

2. The practical significance of the question presented by this case has been greatly reduced if not elimi-

nated by a comprehensive settlement between the major tobacco producers and some 46 States, a settlement which, among other things, has produced sweeping restrictions on tobacco advertising. See, *e.g.*, Alex Kuczynski, *Big Tobacco's Newest Billboards Are on the Pages of Its Magazines*, N.Y. Times, Dec. 12, 1999, at A1. Under the settlement, tobacco manufacturers have agreed to eliminate outdoor advertisements of tobacco products in the settling states.[3] Although the settlement does not bind the billboard companies that petitioner represents, it does bind all major tobacco producers. And under the settlement, tobacco manufacturers have agreed to cease outdoor cigarette advertisements, meaning that they will no longer be leasing space for cigarette advertising billboards from petitioner's members. For its part, while petitioner acknowledges the settlement (Pet. 4 n.1), petitioner does not attempt to explain why, in the wake of the settlement, the issue presented by the petition remains of sufficient importance to justify plenary review.

In fact, it is far from clear that this case continues to present a live controversy. While the record on this point is at present undeveloped, we entertain grave doubts as to whether any of the entities that petitioner represents has any concrete financial stake in the outcome of this case at this juncture. At present, all major tobacco advertisers have agreed to the Master Settlement Agreement. Moreover, pursuant to the Master Settlement Agreement, Illinois has enacted legislation imposing substantial financial penalties on tobacco

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[3] The pertinent provisions of the Master Settlement Agreement can be found in the Appendix to this brief.

manufacturers selling cigarettes in Illinois that do not agree to comply with the Master Settlement Agreement. See 30 ILCS 168/15 (West Supp. 1999). Thus, it seems quite unlikely that any of the billboard companies that petitioner represents still has any realistic likelihood of entering agreements to display cigarette advertising even if the judgment below is overturned. Thus, if this Court granted plenary review, it could well ultimately conclude that the most prudent course of action is to remand the case for a hearing on mootness, rather than reaching the merits of the question presented by the petition. At a minimum, it is clear that the practical import of the decision below is not great. For this reason as well, plenary review would be inappropriate.

3. Yet another factor counsels against plenary review in this case: the decision below is interlocutory. Petitioner challenged the Chicago ordinance at issue not only on preemption grounds, but also under the First Amendment. In reversing, the court of appeals remanded this case to the district court with instructions that it address petitioner's First Amendment claims. See Pet. App. 11a n.4, 13a. Thus, the ultimate outcome of this case remains in doubt. For that reason, review of this case at this time might result in piecemeal demands on this Court's time. Moreover, this litigation will continue regardless how this Court resolves the preemption issue that the petition raises because of petitioner's unadjudicated challenge to the locational restrictions on alcohol billboards. And in light of the tobacco settlement, petitioner's remaining stake in this case largely, if not entirely, involves the alcohol prohibition, making it especially appropriate to let the litigation on the alcohol prohibition run its course.

4. In any event, the decision below was correct. It is supported by the settled rule presuming that Congress does not intend to preempt the traditional police powers of state and local governments. Here, nothing in the text or history of section 5(b) of the FCLAA supplies a basis to overcome this presumption.

When this Court last addressed section 5(b) of the FCLAA, in *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), it cautioned that any inquiry into the preemptive effect of section 5(b) "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 516 (brackets and ellipses in original) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). What is more, a majority of the Court cautioned that section 5(b) should be narrowly construed. See *id.* at 523 (plurality opinion); *id.* at 532-33 (Blackmun, J., concurring in part and dissenting in part). In fact, the Court's approach in *Cipollone* was surgical. For a majority of the Court, preemption turned on whether a particular duty was imposed under state law on those engaged in the marketing and promotion of cigarettes because of a desire to protect public health, or for some other reason, and therefore only state-law duties imposed solely to protect public health should be preempted by section 5(b). See *id.* at 528-29 (plurality opinion) (finding fraudulent misrepresentation claims not preempted because they "are not predicated on a duty 'based on smoking and health' but rather a more general obligation—the duty not to deceive"); *id.* at 554 (Scalia, J., concurring in the judgment in part and dissenting in part) ("I would ask . . . whether whatever the source of the duty,

it imposes an obligation in this case because of the effect of smoking upon health").

The presumption against preemption of historic state and local police powers is fully applicable here. Even petitioner does not quarrel with the court of appeals' conclusion that this ordinance involves an exercise of traditional zoning powers to which the presumption against preemption applies. See Pet. App. 10a-11a. And there is nothing in the text or the legislative history of the FCLAA to suggest that Congress intended to invade this exercise of police powers.

Petitioner argues that the court of appeals improperly drew a distinction between regulation of the location of advertising, which is not preempted, and regulation of its content, which is. See Pet. 14-16. There is nothing in the decision below, however, that endorses a rigid distinction between content and location. Rather, the court of appeals correctly recognized that the Chicago ordinance involves an exercise of local zoning powers and for that reason is based on a governmental interest that should be protected from preemption absent some plain statement of congressional intent. See Pet. App. 8a-9a. To the contrary, as the court of appeals observed, both the statute's own statement of purpose and its legislative history reflects no desire to interfere with the ability of state and local governments to protect minors. See Pet. App. 9a-10a. Indeed, as the court of appeals also observed, petitioner's reading of section 5(b)—finding preemption of any state or local law restricting the promotion of cigarettes if related to the protection of minors' health—would lead to absurd results that Congress could not have intended. See Pet. App. 8a-9a ("We cannot imagine that Congress intended

the states to be without power to prohibit a cigarette company from handing out free cigarettes in an elementary schoolyard.").

Even more important, as the Chicago ordinance's preamble makes plain, the purpose of the ordinance was to protect minors. State and local governments, of course, have ample reasons to be concerned about discouraging the use of cigarettes by minors even apart from the relationship between "smoking and health." Indeed, the preamble to the Chicago ordinance asserts no relationship between smoking and health, but rather asserts that the sale of cigarettes to minors is illegal under applicable state law. Discouraging lawbreaking is surely a legitimate governmental purpose. And even aside from that, the materials before the City Council demonstrated that cigarettes are addictive, see, *e.g.*, R. 10-2A at 535, 539, and hence the City Council could reasonably wish to discourage minors from undertaking an addictive and possibly lifelong habit when they are not yet mature enough to evaluate the consequences of lifelong addictions. Smoking, for example, is a habit that many find unattractive, unpleasant, or inconsiderate, and it is undeniably costly. In short, even if medical science could somehow neutralize the adverse health consequences of cigarettes, most parents would still not want their children to take up smoking for a variety of reasons, just as they do not want them to gamble, drink alcohol, or develop any other addiction. Thus, when a state or local government asserts its desire to protect minors from potentially addictive substances, it asserts a governmental interest far broader than the concern for protecting the public health. Accordingly, it is exceedingly unlikely that Congress, as it preempted state and local regulation "based on smoking and health,"

intended to reach measures designed to discourage illegal sales of cigarettes to minors, or measures designed to protect minors from taking up addictive and costly habits.

For all these reasons, then, the clarity that should be required before federal legislation is held to invade the traditional state and local power to protect minors is not present here. The court of appeals was faithful to the twin rules embraced by a majority of the Court in *Cipollone*—section 5(b) should be narrowly construed, and it should be presumed not to invade traditional state and local police powers. The decision below stands in no tension with *Cipollone* nor the FCLAA, and for that reason should be left undisturbed.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago

LAWRENCE ROSENTHAL*
Deputy Corporation Counsel

BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel

MARDELL NEREIM
Assistant Corporation Counsel
30 North LaSalle Street, Room 800
Chicago, Illinois 60602
(312) 744-5337

*Counsel of Record

Attorneys for Respondent

MASTER SETTLEMENT AGREEMENT

This Master Settlement Agreement is made by the undersigned Settling State officials (on behalf of other respective Settling States) and the undersigned Participating Manufacturers to settle and resolve with finality all Released Claims against the Participating Manufacturers and related entities as set forth herein. This Agreement constitutes the documentation effecting this settlement with respect to each Settling State, and is intended to and shall be binding upon each Settling State and each Participating Manufacturer in accordance with the terms hereof.

I. RECITALS

WHEREAS, more than 40 States have commenced litigation asserting various claims for monetary, equitable and injunctive relief against certain tobacco product manufacturers and others as defendants, and the States that have not filed suit can potentially assert similar claims;

WHEREAS, the settling States that have commenced litigation have sought to obtain equitable relief and damages under state laws, including consumer protection and/or antitrust laws, in order to further the Settling States' policies regarding public health, including policies adopted to achieve a significant reduction in smoking by Youth;

WHEREAS, defendants have denied each and every one of the Settling States' allegations of unlawful conduct or wrongdoing and have asserted a number of defenses to the Settling States' claims, which defenses have been contested by the Settling States;

WHEREAS, the Settling States and the Participating Manufacturers are committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products;

WHEREAS, the Participating Manufacturers recognize the concern of the tobacco grower community that it may be adversely affected by the potential reduction in tobacco consumption resulting from this settlement, reaffirm their commitment to work cooperatively to address concerns about the potential adverse economic impact on such community, and will within 30 days after the MSA Execution Date, meet with the political leadership of States with grower communities to address these economic concerns;

WHEREAS, the undersigned Settling State officials believe that entry into this Agreement and uniform consent decrees with the tobacco industry is necessary in order to further the Settling States' policies designed to reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States; and

WHEREAS, the Settling States and the Participating Manufacturers wish to avoid the further expense, delay, inconvenience, burden and uncertainty of continued litigation (including appeals from any verdicts), and, therefore, have agreed to settle their respective lawsuits and potential claims pursuant to terms which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of the mandates and restrictions related to such measures, as well

as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth;

NOW, THEREFORE, BE IT KNOWN THAT, in consideration of the implementation of tobacco-related health measures and the payments to be made by the Participating Manufacturers, the release and discharge of all claims by the Settling States, and such other consideration as described herein, the sufficiency of which is hereby acknowledged, the Settling States and the Participating Manufacturers, acting by and through their authorized agents, memorialize and agree as follows:

II. DEFINITIONS

* * *

(b) "Adult" means any person or persons who are not Underage.

(c) "Adult-Only Facility" means a facility or restricted area (whether open-air or enclosed) where the operator ensures or has a reasonable basis to believe (such as by checking identification as required under state law, or by checking the identification of any person appearing to be under the age of 27) that no Underage person is present. A facility or restricted area need not be permanently restricted to Adults in order to constitute an Adult-Only Facility, provided that the operator ensures or has a reasonable basis to believe that no Underage person is present during the event or time period in question.

* * *

(m) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "Cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). Except as provided in subsections II(z) and II(mm), 0.0325 ounces of "roll-your-own" tobacco shall constitute one individual "Cigarette."

* * *

(aa) "MSA Execution Date" means November 23, 1998.

* * *

(ii) "Outdoor Advertising" means (1) billboards, (2) signs and placards in arenas, stadiums, shopping malls and Video Game Arcades (whether any of the foregoing are open air or enclosed) (but not including any such sign or placard located in an Adult-Only Facility), and (3) any other advertisements placed (A) outdoors, or (B) on the inside surface of a window facing outward. Provided, however, that the term "Outdoor Advertising"

does not mean (1) an advertisement on the outside of a Tobacco Product manufacturing facility: (2) an individual advertisement that does not occupy an area larger than 14 square feet (and that neither is placed in such proximity to any other such advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet, nor functions solely as a segment of a larger advertising unit or series), and that is placed (A) on the outside of any retail establishment that sells Tobacco Products (other than solely through a vending machine), (B) outside (but on the property of) any such establishment, or (C) on the inside surface of a window facing outward in any such establishment; (3) an advertisement inside a retail establishment that sells Tobacco Products (other than solely through a vending machine) that is not placed on the inside surface of a window facing outward; or (4) an outdoor advertisement at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

(jj) "Participating Manufacturer" means a Tobacco Product Manufacturer that is or becomes a signatory to this Agreement, provided that (1) in the case of a Tobacco Product Manufacturer that is not an Original Participating Manufacturer, such Tobacco Product Manufacturer is bound by this Agreement and the Consent Decree (or, in any Settling State that does not permit amendment of the Consent Decree, a consent decree containing terms identical to those set forth in

the Consent Decree) in all Settling States in which this Agreement and the Consent Decree binds Original Participating Manufacturers (provided, however, that such Tobacco Product Manufacturer need only become bound by the Consent Decree in those Settling States in which the Settling State has filed a Released Claim against it), and (2) in the case of a Tobacco Product Manufacturer that signs this Agreement after the MSA Execution Date, such Tobacco Product Manufacturer, within a reasonable period of time after signing this Agreement, makes any payments (including interest thereon at the Prime Rate) that it would have been obligated to make in the intervening period had it been a signatory as of the MSA Execution Date. "Participating Manufacturer" shall also include the successor of a Participating Manufacturer. Except as expressly provided in this Agreement, once an entity becomes a Participating Manufacturer such entity shall permanently retain the status of Participating Manufacturer. Each Participating Manufacturer shall regularly report its shipments of Cigarettes in or to the fifty United States, the District of Columbia and Puerto Rico to Management Science Associates, Inc. (or a successor entity as set forth in subsection (mm)). Solely for purposes of calculations pursuant to subsection IX(d), a Tobacco Product Manufacturer that is not a signatory to this Agreement shall be deemed to be a "Participating Manufacturer" if the Original Participating Manufacturers unanimously consent in writing.

* * *

(qq) "Settling State" means any State that signs this Agreement on or before the MSA Execution Date. Provided, however, that the term "Settling State" shall not

include (1) the States of Mississippi, Florida, Texas and Minnesota; and (2) any State as to which this Agreement has been terminated.

* * *

(uu) "Tobacco Product Manufacturer" means an entity that after the MSA Execution Date directly (and not exclusively through any Affiliate):

(1) manufactures Cigarettes anywhere that such manufacturer intends to be sold in the States, including Cigarettes intended to be sold in the States through an importer (except where such importer is an Original Participating Manufacturer that will be responsible for the payments under this Agreement with respect to such Cigarettes as a result of the provisions of subsections II(mm) and that pays the taxes specified in subsection II(z) on such Cigarettes, and provided that the manufacturer of such Cigarettes does not market or advertise such Cigarettes in the States);

(2) is the first purchaser anywhere for resale in the States of Cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the States; or

(3) becomes a successor of an entity described in subsection (1) or (2) above.

The term "Tobacco Product Manufacturer" shall not include an Affiliate of a Tobacco Product Manufacturer unless such Affiliate itself falls within any of the subsections (1) - (3) above.

(vv) "Tobacco Products" means Cigarettes and smokeless tobacco products.

* * *

(xx) "Transit Advertisements" means advertising on or within private or public vehicles and all advertisements placed at, on or within any bus stop, taxi stand, transportation waiting area, train station, airport or any similar location. Notwithstanding the foregoing, the term "Transit Advertisements" does not include (1) any advertisement placed in, on or outside the premises of any retail establishment that sells Tobacco Products (other than solely through a vending machine) (except if such individual advertisement (A) occupies an area larger than 14 square feet; (B) is placed in such proximity to any other such advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet; or (C) functions solely as a segment of a larger advertising unit or series); or (2) advertising at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

(yy) "Underage" means younger than the minimum age at which it is legal to purchase or possess (whichever minimum age is older) Cigarettes in the applicable Settling State.

(zz) "Video Game Arcade" means an entertainment establishment primarily consisting of video games (other than video games intended primarily for use by persons 18 years of age or older) and/or pinball machines.

* * *

(bbb) "Youth" means any person or persons under 18 years of age.

III. PERMANENT RELIEF

* * *

(d) *Elimination of Outdoor Advertising and Transit Advertisements.* Each Participating Manufacturer shall discontinue Outdoor Advertising and Transit Advertisements advertising Tobacco Products within the Settling States as set forth herein.

(1) *Removal.* Except as otherwise provided in this section, each Participating Manufacturer shall remove from within the Settling States within 150 days after the MSA Execution Date all of its (A) billboards (to the extent that such billboards constitute Outdoor Advertising) advertising Tobacco Products; (B) signs and placards (to the extent that such signs and placards constitute Outdoor Advertising) advertising Tobacco Products in arenas, stadiums, shopping malls and Video Game Arcades; and (C) Transit Advertisements advertising Tobacco Products.

(2) *Prohibition on New Outdoor Advertising and Transit Advertisements.* No Participating Manufacturer may, after the MSA Execution Date, place or cause to be placed any new Outdoor Advertising advertising Tobacco Products or new Transit Advertisements advertising Tobacco Products within any Settling State.

(3) *Alternative Advertising.* With respect to those billboards required to be removed under subsection (1) that are leased (as opposed to owned) by any Participating Manufacturer, the Participating Manufacturer will allow the Attorney General of the Settling State within which such billboards are

located to substitute, at the Settling State's option, alternative advertising intended to discourage the use of Tobacco Products by Youth and their exposure to second-hand smoke for the remaining term of the applicable contract (without regard to any renewal or option term that may be exercised by such Participating Manufacturer). The Participating Manufacturer will bear the cost of the lease through the end of such remaining term. Any other costs associated with such alternative advertising will be borne by the Settling State.

(4) *Ban on Agreements Inhibiting Anti-Tobacco Advertising*. Each Participating Manufacturer agrees that it will not enter into any agreement that prohibits a third party from selling, purchasing or displaying advertising discouraging the use of Tobacco Products or exposure to second-hand smoke. In the event and to the extent that any Participating Manufacturer has entered into an agreement containing any such prohibition, such Participating Manufacturer agrees to waive such prohibition in such agreement.

(5) *Designation of Contact Person*. Each Participating Manufacturer that has Outdoor Advertising or Transit Advertisements advertising Tobacco Products within a Settling State shall, within 10 days after the MSA Execution Date, provide the Attorney General of such Settling State with the name of a contact person to whom the Settling State may direct inquiries during the time such Outdoor Advertising and Transit Advertisements are being eliminated, and from whom the Settling

State may obtain periodic reports as to the progress of their elimination.

(6) *Adult-Only Facilities.* To the extent that any advertisement advertising Tobacco Products located within an Adult-Only Facility constitutes Outdoor Advertising or a Transit Advertisement, this subsection (d) shall not apply to such advertisement, provided such advertisement is not visible to persons outside such Adult-Only Facility.

* * *

Supreme Court, U.S.
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No. 99-1172

IN THE
Supreme Court of the United States

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC.,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: February 11, 2000

20PP

QUESTION PRESENTED

Whether a Chicago Ordinance that essentially bans all publicly visible advertising of cigarette products is preempted by Section 5(b) of the Federal Cigarette Labeling and Advertising Act as a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes."

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 99-1172

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC.,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law and policy center with supporters in all 50 states, including many within the City of Chicago.[1] WLF devotes a substantial

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary

(continued...)

portion of its resources to protecting the right of commercial free speech. To that end, WLF has appeared before this Court and numerous other federal and state courts in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495 (1996).

WLF also believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act ("FCLAA"). That policy significantly reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

WLF also filed a brief in this case when it was before the Seventh Circuit. WLF is filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby adopts by reference the Statement of the Case contained in the Petition.

In brief, Petitioner Federation of Advertising Industry Representatives, Inc. ("FAIR") challenges a Chicago city ordinance (the "Ordinance") that prohibits the outdoor display of tobacco and alcoholic beverage advertisements in large portions of Chicago (the "City"). While the Ordinance contains certain exceptions (for example, § 5.17(a)(8) excepts signs displayed in portions of the City zoned C3

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[1](...continued)
contribution to the preparation or submission of this brief.

(Commercial-Manufacturing), C4 (Motor Freight Terminal), or M (Manufacturing)), the Ordinance prohibits a large percentage of the outdoor cigarette and alcoholic beverage advertising heretofore displayed in the City.

Soon after the Ordinance's enactment in September 1997, FAIR challenged it by filing suit in the U.S. District Court for the Northern District of Illinois. FAIR asserted, *inter alia,* that the Ordinance violates the First Amendment by imposing unwarranted speech restrictions and that Congress intended to preempt such laws when it adopted the FCLAA. On July 31, 1998, the district court granted FAIR's motion for summary judgment on the issue of preemption. Petition Appendix ("Pet. App.") 14a-34a. Because of its preemption ruling, the district court declined to reach the free speech issue. Pet. App. 33a n.9.

On appeal, the Seventh Circuit reversed. Pet. App. 1a-13a. The court held that, with one minor exception, the Ordinance was not preempted by the FCLAA.[2] The court stated that the Ordinance was an effort at land-use regulation and that "[l]and-use and zoning issues have 'always been an intensely local area of the law.'" *Id.* at 10a (quoting *Gardner v. City of Baltimore Mayor and City Council,* 969 F.2d 63, 67 (4th Cir. 1992)). While conceding that the preemption provision of the FCLAA could be read to apply

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[2] The court held that the provision of the Ordinance that exempted from restriction all signs that are limited to "a generic description of cigarettes" (§ 5.17(a)(3) of Title 17 of the Municipal Code of Chicago) was preempted by the FCLAA. Pet. App. 12a. The court went on to hold that § 5.17(a)(3) was severable from the remainder of the Ordinance and thus that the remaining provisions were fully enforceable. *Id.* at 13a. The effect of this ruling was to render the Ordinance more restrictive of commercial speech than as originally enacted.

to the Ordinance, the court rejected that interpretation because (the court believed) such "uncritical literalism" would "lead[] to results that we cannot believe Congress intended." *Id.* at 7a, 8a.

In determining congressional intent, the court focused not on the language of the preemption provision, but on language contained in the FCLAA's preamble and in its legislative history. Based on those sources, the court determined: (1) Congress intended to preserve local power to regulate in "areas of traditional local concern" -- in particular, the power to regulate "sales to minors, taxation, indoor smoking, or 'similar police regulations,'" (*id.* at 10a (quoting S. Rep. No. 566, 91st Cong., 2d Sess. (1969)); and (2) Congress intended to preempt local regulatory power in such areas only to the extent that it interfered with a federal interest in uniformity of labeling and advertising regulations. *Id.* at 9a. Because the court determined that regulation of sign location is an area of "traditional local concern," and that the Ordinance did not interfere with the federal interest in uniformity, the Ordinance was not preempted. *Id.* at 10a-12a.

The appeals court justified its refusal to focus on the language of the FCLAA's preemption provision by invoking the "presumption against pre-emption" of state and local law by federal law. *Id.* at 7a. The court said that giving full effect to the broadly worded language of the FCLAA's preemption provision would be improper because the effect would be "to read the presumption against pre-emption out of the law." *Id.*

The appeals court reversed the district court's preemption finding (with the exception described in Note 2 above)

and remanded the case to the district court for consideration of Petitioner's constitutional challenges to the Ordinance. *Id.* at 13a. The appeals court denied FAIR's petition for rehearing *en banc* on October 14, 1999. *Id.* at 35a-36a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Conflict Among the Circuits Regarding the Scope of Federal Preemption Under the FCLAA

One month after the Seventh Circuit denied the petition for rehearing, the Ninth Circuit held that a Tacoma, Washington ordinance -- identical in all relevant respects to the Chicago Ordinance -- was preempted by the FCLAA. *Lindsey v. Tacoma-Pierce County Health Department,* 195 F.3d 1065 (9th Cir. 1999). Pet. App. 75a-93a. The Court should grant review in this case in order to resolve the irreconcilable conflict between these decisions, on an issue of significant national importance.

There can be no serious argument that *Lindsey* is not in direct conflict with the decision below. Indeed, the Ninth Circuit went out of its way to reject the Seventh Circuit's holding and to criticize its rationale, as well as decisions of the Second and Fourth Circuits that upheld similar ordinances restricting tobacco advertising.[3] *Lindsey* stated

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[3] *See Greater New York Metropolitan Food Council, Inc. v. Giuliani,* 195 F.3d 100 (2d Cir.1999), *cert. filed,* No. 99-1171 (Jan. 12, 2000); *Penn Advertising, Inc. v. Mayor and City Council,* 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded,* 518 U.S. 1030 (1996), *adopted as modified,* 101 F.3d 332 (4th Cir. 1996), *cert. denied,* 520 U.S. 1204

(continued...)

that the Seventh Circuit's rationale "not only is unsupported by reference to the text, but the Congressional purpose of [the FCLAA's preemption provision] supports the preemption of a ban on outdoor tobacco advertising." *Lindsey*, Pet. App. 87a. The Tacoma Ordinance and the Chicago Ordinance cannot meaningfully be distinguished from one another; in each instance the local government banned outdoor tobacco advertising in vast sections of the city without imposing similar restrictions on other types of advertising.[4] Yet, the Ninth and Seventh Circuits reached diametrically opposed conclusions regarding the effect of the FCLAA on those ordinances. Review by this Court is warranted to resolve the conflict created by these decisions.

On January 18, 2000, the parties in *Lindsey* filed briefs on the issue of whether the Ninth Circuit ought to grant rehearing *en banc*. The Ninth Circuit has not provided any indication, however, that it is seriously entertaining the thought of granting rehearing, let alone that it is seriously considering reversing the panel decision. In the absence of substantial evidence suggesting that the Ninth Circuit will on its own eliminate the circuit conflict by reversing the panel decision, there is no reason for this Court to delay its resolution of the conflict.

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[3](...continued)
(1997).

[4] The Chicago Ordinance's advertising ban applies to alcoholic beverages as well, while the Tacoma Ordinance does not. However, that distinction is immaterial for purposes of FCLAA issues; in each instance, advertising of tobacco products is restricted far more heavily than advertising for virtually all other products, based solely on the contents of the advertising.

Moreover, the issue takes on added urgency because of the large number of local jurisdictions that have adopted bans on outdoor cigarette advertising in the years following the Fourth Circuit's 1996 *Penn Advertising* decision upholding Baltimore's ban. Such ordinances have spawned large numbers of lawsuits, many of them filed outside the four circuits (the Second, Fourth, Seventh, and Ninth) that have already ruled on the issue. *See, e.g., Missouri Retailers Assoc. v. City of St. Louis,* No. 4:98CV1514 (E.D.Mo. 1999) (striking down St. Louis ban on outdoor tobacco advertising on First Amendment grounds); *Rockwood v. City of Burlington,* 21 F. Supp. 2d 411 (D. Vt. 1998) (holding that ban on outdoor tobacco advertising is preempted by FCLAA); *Chiglo v. City of Preston,* 909 F. Supp. 675 (D.Minn. 1995) (same); *Lorillard v. Reilly,* No. 99-11118-WGY (D.Mass. Jan. 24, 2000) (upholding Massachusetts ban on outdoor tobacco advertising in face of FCLAA and First Amendment challenges).

There is every reason to believe that litigation raising FCLAA challenges to such advertising bans will continue. Indeed, the First Circuit has granted expedited review of the district court's FCLAA decision in *Lorillard* and has enjoined enforcement of the Massachusetts ban pending appeal.

Moreover, there is no reason to view the Ninth Circuit's FCLAA decision as an aberration that is unlikely to be replicated. At least four federal district courts have concluded that outdoor tobacco advertising bans substantially similar or identical to Chicago's are preempted by the FCLAA. Two (*Rockwood* and *Chiglo*) are cited above. The other two are the district court decisions in this case and in *Greater New York Metropolitan Food Council, Inc. v.*

Giuliani, No. 98 Civ. 251 (DAB) (S.D.N.Y. Dec. 15, 1998), *rev'd and remanded*, 195 F.3d 100 (2d Cir. 1999). Accordingly, as challenges to outdoor tobacco advertising bans continue to make their way through the courts, there is every reason to believe that other federal appeals courts will join the Ninth Circuit in determining that such bans at the state and local level are preempted by the FCLAA.

There is no sound reason for this Court to delay consideration of the FCLAA issue until after additional appeals courts have weighed in on the issue. In view of the existing disarray among the lower federal courts on the issue, State and local governments considering adopting such bans are in desperate need of guidance from the Court. Advertisers and tobacco companies are also in need of guidance regarding their rights to provide truthful information to the public without interference from State and local governments.

II. The Seventh Circuit's Decision Is Contrary to the Plain Text of the FCLAA and This Court's Decision in *Cipollone*

The Court should grant the petition for the additional reason that the Seventh Circuit's decision is contrary to the plain text of the FCLAA and this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

The FCLAA's preemption provision states in relevant part:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the

packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

At least six Justices in *Cipollone* recognized that the language of § 1334(b) is expansive. Even after giving the language of § 1334(b) a "narrow" reading (*Cipollone*, 505 U.S. at 518), the *Cipollone* plurality emphasized that the FCLAA's ban on *any* "requirement or prohibition" "sweeps broadly." *Id.* at 521. *See also id.* at 535 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part).

The Seventh Circuit did not appear to disagree with that conclusion. Pet. App. 6a-7a (the FCLAA's preemption provision is "similar in its breadth" to the "expansive" preemption language of the Employee Retirement Income Security Act ("ERISA")). Yet the court made no effort to apply § 1334(b)'s expansive preemption language to the facts of this case.[5] Indeed, the Court rejected *any* analysis of § 1334(b)'s language on the ground that such an analysis would be an inappropriate exercise in "uncritical literalism." Pet. App. 6a. Instead, the court based its holding that § 1334(b) did not preempt the Ordinance on its conclusion that the Ordinance did not "frustrate or burden" what the court viewed as the § 1334(b)'s essential purpose -- to prevent commerce from being impeded by diverse, nonuniform, and confusing cigarette advertising regulations. *Id.* at 11a-12a.

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[5] The court did not, for example, consider whether the Ordinance is a "prohibition based on smoking and health," or whether it is "with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b).

That atextual approach to federal preemption analysis is directly contrary to the approach mandated by *Cipollone* and other preemption decisions of this Court. As the Seventh Circuit recognized, *Cipollone* held that "[t]he purpose of Congress is the ultimate touchstone of preemption analysis." *Id.* at 5a (quoting *Cipollone*, 505 U.S. at 516). *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-87 (1996) ("any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*") (emphasis in original). The actual statutory language employed by Congress is, of course, the primary basis upon which congressional intent is to be determined. *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 760 (1999). Accordingly, the Seventh Circuit's analysis -- by eschewing any examination of § 1334(b)'s language -- was flawed from the outset.

After closely examining the language of § 1334(b), the Court in *Cipollone* determined that some common-law tort claims against cigarette manufacturers are preempted by the FCLAA but that others are not. The Court determined that failure-to-warn claims are preempted to the extent that they allege a duty to include health warnings in advertising, because such claims amount to requirements "based on smoking and health." *Cipollone*, 505 U.S. at 524 (plurality opinion). Conversely, the Court determined that fraudulent misrepresentation claims are to a large extent *not* preempted because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation -- the duty not to deceive." *Id.* at 528 (plurality opinion). In sum, *Cipollone* made clear that the determination of whether a particular State or local "requirement or prohibition" is preempted by § 1334(b) can only be made after examining whether the requirement/

prohibition is covered by the statute's preemptive language. By failing to undertake that examination, the Seventh Circuit has deviated from *Cipollone's* mandate.

Moreover, the Seventh Circuit decision is unsupportable even when considered on its own terms. Citing language in the FCLAA's preamble, the court concluded that Congress intended to preempt local authority in areas traditionally regulated at the local level only to the extent that the local regulation interfered with a federal interest in uniformity of tobacco labeling and advertising regulations.[6] The Seventh Circuit determined that the Ordinance was not preempted because it did not interfere with the federal interest in uniformity. Pet. App. 10a-12a.

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[6] The portion of the FCLAA preamble cited and relied on by the Seventh Circuit reads as follows:

> It is the policy of the Congress and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby --
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

But the Ordinance quite clearly *does* interfere with the federal interest in uniformity of advertising regulations. As a result of the Seventh Circuit's decision, advertisers will face a maze of additional, nonuniform regulations. In some locations tobacco advertisers need only concern themselves with traditional zoning regulations, while in other locations they will also have to contend with additional, nonuniform restrictions applicable only to tobacco advertising. Simply because tobacco advertisers are already subject to some degree of regulation at the local level is not reason to ignore Congress's mandate and to permit an unlimited degree of nonuniform, local regulation.

The court suggested that § 1334(b) is intended to bar State and local governments from mandating the specific content of tobacco advertising but not to bar them from prohibiting tobacco advertising in certain locations. But that interpretation ignores the plain language of § 1334(b); the statute bars any "requirement *or prohibition*" (emphasis added) imposed for the purposes described in § 1334(b). There is no avoiding the conclusion that a law prohibiting cigarette advertising (but not other types of advertising) at certain locations is a "prohibition" within the meaning of the statute. The Seventh Circuit's interpretation of the FCLAA, by limiting preemption to those ordinances that create nonuniformity by specifying the content of advertisements, simply writes the word "prohibition" out of the statute.

In sum, review of the decision below is warranted for the additional reason that it is plainly contrary to this Court's decision in *Cipollone* and the text of the FCLAA.

III. The Court Should Grant Review in Order to Provide Guidance Regarding the Extent of the Presumption Against Preemption

In recent preemption cases, the Court invariably has begun its analysis by reciting two precepts that guide its analysis. First, the Court states that preemption ultimately must be based on the intent of Congress; if Congress has expressed its intent to preempt local law, then the issue is resolved in favor of preemption by virtue of operation of the Supremacy Clause. *See, e.g., Medtronic,* 518 U.S. at 486-87; *Cipollone,* 505 U.S. at 516; *English v. General Electric Co.,* 496 U.S. 72, 78-79 (1990).

Second, the Court states that there is a presumption that Congress does not intend its preemption statutes to supersede State law in fields that the States have traditionally occupied, unless Congress has made very clear its intent to do so. *See, e.g., Medtronic,* 518 U.S. at 485.

The Court has not directly confronted the inherent contradiction in those two pronouncements on preemption. If the purpose of Congress is truly the "touchstone" of preemption analysis, then a presumption against preemption can only lead the Court away from the touchstone, substituting instead a bias in favor of preserving state law regardless of congressional intent.

Moreover, the Court has not consistently applied the presumption against preemption. Indeed, in numerous preemption cases over the past two decades, the presumption (whose origin is somewhat obscure) is not mentioned at all. *See, e.g., Freightliner Corp. v. Myrick,* 514 U.S. 280 (1995); *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374

(1992); *Norfolk & Western R. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991). In *Cipollone*, the Court suggested that the existence of an express preemption statute precluded the possibility of implied federal preemption. *Cipollone*, 505 U.S. at 517. Just three years later, the Court disavowed that suggestion. *Myrick*, 514 U.S. at 288-89.

The inherent tension within the Court's preemption case law has led to considerable confusion among the lower federal courts. That confusion is well illustrated by the decision below. The Seventh Circuit acknowledged that the plain language of the FCLAA dictated a conclusion that the FCLAA preempted the Ordinance. The court nonetheless felt itself bound by this Court's presumption against preemption to ignore standard rules of statutory construction in order to uphold the Ordinance. Pet. App. 6a-9a.

The Court should grant review in this case in order to dispel the confusion engendered by the Court's recent preemption case law. The Court should spell out once and for all whether standard rules of statutory construction apply to preemption cases, or whether the presumption against preemption is so strong as to permit courts to disregard federal statutory language in order to avoid interference with the traditional police powers of State and local governments.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: February 11, 2000

(4)

No. 99-1172

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IN THE

Supreme Court of the United States

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit corporation,

Petitioner,

—v.—

CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Of Counsel:

JONATHAN R. DONNELLAN
JOEL KURTZBERG
MATTHEW A. LEISH
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005

PAUL M. LEVY
PHILLIP J. ZISOOK
BRIAN D. SAUCIER
DEUTSCH, LEVY & ENGEL, CHARTERED
225 W. Washington Street, Suite 1700
Chicago, Illinois 60606
(312) 346-1460

FLOYD ABRAMS
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner

February 22, 2000

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Secondary Authorities

Robert L. Stern, Eugene Gressman, and Stephen M Shapiro, SUPREME COURT PRACTICE 226 (6th ed. 1986) 3-4

The City of Chicago ("the City") argues that review should be denied because: (1) Petitioner's claim regarding a circuit split is premature; (2) a 1998 settlement between cigarette manufacturers and 46 States has rendered the question presented moot and/or insignificant; (3) the decision below is interlocutory; and (4) the decision below is correct. The City's arguments should be rejected and *certiorari* should be granted.

1. The City does not and cannot dispute that the Seventh Circuit's opinion in this case (as well as the Fourth Circuit's opinion in *Penn Advertising, Inc.* v. *Mayor and City Council*[1] and the Second Circuit's opinion in *Greater New York Metropolitan Food Council, Inc.* v. *Giuliani*[2]) directly conflicts with the Ninth Circuit's ruling in *Lindsey* v. *Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999). Nor does the City deny that the very fact of the resulting circuit split concerning the scope of federal preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA") undermines the policy of FCLAA of preventing "diverse, nonuniform, and confusing" cigarette "advertising regulations." 15 U.S.C. § 1331(2) (1994).

The City argues, however, that Petitioner's claim of conflict is premature in light of the Ninth Circuit's request for briefing on whether *Lindsey* should be reheard *en banc*. (Brief for Respondent in Opposition ("Resp. Opp. Br.") at 7-9) At most, the Ninth Circuit's request for briefing on that issue suggests that this Court should defer consideration of the petition until the Ninth Circuit has decided whether to rehear *Lindsey*. Petitioner, in fact, suggested such deferral to the Court by letter of February 17, 2000.

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[1] 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

[2] 195 F.3d 100 (2d Cir. 1999), *petition for certiorari filed*, 68 U.S.L.W. 3480 (Jan. 12, 2000) (No. 99-1171).

In the event that the Ninth Circuit determines not to rehear *Lindsey*, the seriousness of the circuit conflict will not be diminished (*see* Resp. Opp. Br. at 9) by the fact that the defendants in that case have agreed not to seek further review of the Ninth Circuit's decision. Like any other decision by a losing party not to seek further review, the *Lindsey* defendants' decision will leave *Lindsey* in place as the law of the circuit, law in direct conflict with the decisions of three other federal courts of appeal.[3]

2. The City argues that a 1998 settlement agreement between several cigarette manufacturers and 46 States (the "Settlement Agreement") renders this case moot and/or has "greatly reduced if not eliminated" the practical significance of the question presented by this case. (Resp. Opp. Br. at 9-10) The City raised the same issue below, but the Seventh Circuit denied the City's request for a hearing on the issue.[4] The Settlement Agreement does not diminish the importance of this case at all.

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[3] In its *amicus* brief supporting rehearing in *Lindsey*, the United States urged the court "to address the direct Circuit split created by the panel . . . with regard to an important federal statutory scheme in the context of an issue of public concern." Brief of the United States as *Amicus Curiae* Regarding Rehearing *En Banc* at 16. That—and the fact that the Seventh and Second Circuits disregarded this Court's controlling decision in *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992)—is precisely why *certiorari* in this case and *Greater New York Metropolitan Food Council*, No. 99-1171, is warranted. That 19 States have also filed an *amici* brief urging the Ninth Circuit to rehear *Lindsey* because of the national importance of the decision further undermines the City's contention that the instant case is unworthy of this Court's review.

[4] *See* Motion for Remand to District Court for a Hearing Vacating Injunction on Grounds of Mootness and to Hold Briefing in Abeyance Pending a Decision on This Motion and December 21, 1998 Opinion Denying the motion, attached hereto as App. 1a-10a.

Neither Petitioner nor its members are parties to the Settlement Agreement, which binds only the cigarette manufacturers that have signed it. While under the Settlement Agreement, these manufacturers have agreed to certain restrictions on outdoor cigarette advertising, the Settlement Agreement does not affect the ability of retailers or non-signatory manufacturers to advertise cigarettes outdoors in any way. Nor does the Settlement Agreement preclude the signatory manufacturers themselves from displaying outdoor advertising on the premises of retail establishments. In short, the right of Petitioner's members to sell cigarette outdoor space—to both signatories and non-signatories of the Settlement Agreement—is very much still at stake in this case. As such, it is clearly not moot. *See Powell* v. *McCormack*, 395 U.S. 486, 496 (1969) ("a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome").

3. The City's argument that this case is inappropriate for plenary review because the decision below is interlocutory (Resp. Opp. Br. at 11) is equally misconceived. To allow the boundaries of the preemptive scope of the FCLAA to remain unsettled for a period of what may well be years—in the face of an immediate circuit conflict—while other issues are tried and appealed would only delay resolution of a significant legal issue that should best be resolved now. *See Geissal v. Moore Medical Corp.*, 524 U.S. 74, 79 (1998); *United States v. General Motors Corp.*, 323 U.S. 373, 374-377 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916); *Forsyth v. Hammond*, 166 U.S. 506, 514 (1896); Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, SUPREME COURT PRACTICE 226 (6th ed. 1986) (even though other issues remained to be decided below, the Court has granted *certiorari* where there was a conflict on a question of law with another court of appeals which would justify review of a final decree or

judgment); *see also id.* (*certiorari* granted where nonfinal judgment presented "a novel and important question of law and where petitioner's position, if sustained, would render the decision wholly void"). The need to resolve the conflict among the circuits on this important question of federal law is both immediate and urgent.

Moreover, a large number of local jurisdictions have adopted ordinances banning or restricting outdoor cigarette advertising in the past several years. These measures have spawned a large amount of litigation.[5] This multiplicity of local regulations and conflicting court decisions determining their validity or invalidity is precisely the "diverse, confusing, and nonuniform" result that Congress sought to avoid in passing the FCLAA. *See* 15 U.S.C. § 1331(2) (1994). States and local governments adopting such regulations and the advertisers of cigarettes affected by them are in need of guidance from the Court.

4. The City fails to justify the Seventh Circuit's refusal to "give effect to [the] plain language" of FCLAA § 1334(b) in this case. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). This Court, stating that Section 1334(b) "provides a reliable indicium of congressional intent with respect to state authority," *id.* at 517, stressed that the task in determining the scope of FCLAA preemp-

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[5] In addition to *Penn Advertising*, *Greater New York Metropolitan Food Council*, *Lindsey*, and this case, there have been numerous district court cases that have ruled on the application of FCLAA preemption to local laws regulating cigarette advertising. *See, e.g.*, *Rockwood* v. *City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding that ordinance regulating outdoor cigarette advertising is preempted by FCLAA); *Chiglo* v. *City of Preston*, 909 F. Supp. 675 (D. Minn. 1995) (same); *Lorillard Tobacco Co.* v. *Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999) *appeal pending*, No. 00-1117 (1st Cir. 2000) (rejecting FCLAA preemption challenge to law regulating outdoor cigarette advertising).

tion is to construe "the precise language" of Section 1334(b). *Id.* at 523. The Court described this task as "straightforward," *id.* at 524, concluding that there is "no 'good reason to believe' that Congress meant less than what it said" in the plain language of Section 1334(b). *Id.* at 522 (citation omitted).

The Seventh Circuit, however, in effect determined that *Cipollone* is no longer good law and that the preemptive effect of FCLAA should be considered in light of subsequent decisions by this Court involving other statutes. *See* Petition for Certiorari, Appendix ("Pet. App.") 5a-7a; *but see Agostini v. Felton,* 521 U.S. 203, 237 (1997) (rejecting the proposition "that other courts should conclude that our more recent cases have, by implication, overruled an earlier precedent").[6] The court thus dismissed the language of Section 1334(b) as " 'unhelpful,' " Pet. App. 6a (citation omitted), and read into the provision a "zoning" exception to preemption allowing state and local governments to ban cigarette advertising. Such an exception is incompatible with "the plain language" of Section 1334(b) and entirely different from the types of regulations that Congress indicated Section 1334(b) does *not* preempt—regulations that do *not* target cigarette advertising based on concerns about smoking and health. *See* S. Rep. No. 566, 91st Cong., 2d Sess. 12 (1969). The exception created by the Seventh Circuit would eviscerate Section 1334(b)'s express command that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of . . . cigarettes."

Nor is there any merit to the City's argument that the Ordinance is not "based on smoking and health" because it

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[6] A concurring opinion in *Lindsey* by Judge O'Scannlain, issued after the filing of the petition in this case, relating to this subject is annexed hereto as App. 11a-13a.

serves "broader interests," such as discouraging illegal tobacco sales to minors. (Resp. Opp. Br. at 14) The District Court rejected this defense of the Ordinance in scathing terms, *see* Pet. App. 23a-30a, noting that tobacco sales to minors were made illegal in the first instance precisely because of concerns about smoking and health. Pet. App. 29a-30a. The Seventh Circuit did not disagree with the District Court's conclusion in this regard[7] but instead treated the purpose of the Ordinance as irrelevant—despite Section 1334(b)'s injunction against state and local requirements or prohibitions "based on smoking and health." In this respect, as in others, the Seventh Circuit disregarded the plain language of Section 1334(b) and the teaching of *Cipollone*, as well as this Court's direction that preemption analysis should take into consideration both the purpose and effect of a challenged measure. *See Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 105-06 (1992).[8]

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[7] Likewise, the Second Circuit in *Greater New York Metropolitan Food Council* also found the New York ordinance at issue in that case to be "based on smoking and health" because its purpose and effect was to promote health goals. *See* Pet. App. 54a-55a.

[8] This Court in *Cipollone* noted that Congress fashioned Section 1334(b) in its current form in 1969 in response to actions the states were preparing to take to regulate cigarette advertising, including proposed California legislation to ban cigarette advertising. 505 U.S. at 515 & n.11; *see id.* at 539 (separate opinion of Blackmun, J., joined by Kennedy & Souter, JJ.) (Section 1334(b) bars states from banning cigarette advertising).

CONCLUSION

For the reasons stated above and for those set forth in our petition, it is respectfully submitted that the petition for a writ of *certiorari* should be granted.

Dated: New York, New York
February 22, 2000

Respectfully submitted,

FLOYD ABRAMS
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Of Counsel:

JONATHAN R. DONNELLAN
JOEL KURTZBERG
MATTHEW A. LEISH
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

PAUL M. LEVY
PHILLIP J. ZISOOK
BRIAN D. SAUCIER
DEUTSCH, LEVY & ENGEL, CHARTERED
225 W. Washington Street, Suite 1700
Chicago, Illinois 60606
(312) 346-1460

Attorneys for Petitioner

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3191

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, the CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago,

Defendants-Appellants.

Appeal From the United States District Court
For the Northern District of Illinois,
Eastern Division

No. 97 C 7619

The Honorable
MILTON I. SHADUR,
Judge Presiding

MOTION FOR REMAND TO DISTRICT COURT FOR A REARING ON VACATING INJUNCTION ON GROUNDS OF MOOTNESS AND TO HOLD BRIEFING IN ABEYANCE PENDING A DECISION ON THIS MOTION

The defendants-appellants, the CITY OF CHICAGO, the CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago, by their attorney, BRIAN L. CROWE, Corporation Counsel of the City of Chicago, hereby move this court to remand this case to the district court for a hearing on whether the injunction should be vacated as moot and to hold briefing in abeyance pending a decision on this motion, and in support of their motion, state as follows:

BACKGROUND

This is an appeal from the district court's order holding that a city ordinance limiting the locations of billboards advertising cigarettes and alcoholic beverages is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-41 (1994). (A copy of the district court's memorandum opinion and order is attached to this motion at A-1.) As to tobacco products, the City's ordinance prohibits the placement of signs advertising cigarettes in publicly visible locations, but does not apply to signs inside the premises licensed to sell tobacco products, to signs on such premises containing the name or slogan of the premises, to signs containing a generic description of cigarettes, or to neon or electrical signs advertising cigarettes on premises licensed to sell tobacco. *See* Municipal Code of Chicago, Title 17, § 5.17. (A copy of the ordinance is attached at A-29). In addition, the ordinance does

not limit or prohibit the placement of signs advertising cigarettes at special events, on any CTA vehicle, on property owned, leased or operated by the Illinois Sports Facilities Authority, at Comiskey Park, Soldier Field, the United Center, or Wrigley Field, on any property adjacent to an interstate highway, or in any district designated as a commercial-manufacturing district, a motor freight terminal district or a manufacturing district. *Id.*

The plaintiffs, an organization of entities that own outdoor advertising sign structures in the City and lease space to cigarette and alcoholic beverage manufacturers, *see* R. 1-1, filed a complaint challenging the City's ordinance. The complaint alleged that the ordinance violated the First Amendment of the United States Constitution, that the limitation on cigarette advertising was preempted by federal law, and that the limitation on advertising of alcoholic beverages was preempted by state law. *Id.*

The district court held that the limitations the ordinance placed on cigarette advertising were preempted by the Federal Cigarette Labeling and Advertising Act. *See* A-21. The district court then held that the provisions relating to the advertising of alcoholic beverages were not severable from the limitations on cigarette advertising, and that, therefore, the entire ordinance was invalid. *See* A-24-25. The district court declared the ordinance null, void and of no legal effect, and enjoined the City from enforcing it. *See* A-25. The City appealed from that order.

On November 23, 1998, the state of Illinois entered the master settlement agreement between participating states and tobacco manufacturers to settle the states' litigation against the tobacco industry. A copy of the settlement agreement is attached to this motion at A-32. As a part of this settlement agreement, tobacco manufacturers have agreed to eliminate outdoor advertisements of tobacco products. *See* A-41. The settlement agreement defines "outdoor advertising" as follows:

> (1) billboards, (2) signs and placards in arenas, stadiums, shopping malls and Video Game Arcades (whether any of the foregoing are open air or enclosed) (but not including any such sign or placard in an Adult-Only Facility), and (3) any other advertisements placed (A) outdoors, or (B) on the inside surface of a window facing outward.

See A-36. The settlement also provides that the following are not included within the definition of "outdoor advertising":

> (1) an advertisement on the outside of a Tobacco Product manufacturing facility; (2) an individual advertisement that does not occupy an area larger than 14 square feet (and that neither is placed in such proximity to any other advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet, nor functions solely as a segment of a larger advertising unit or series), and that is placed (A) on the outside of any retail establishment that sells Tobacco Products (other than solely through a vending machine), (B) outside (but on the property of) any such establishment, or (C) on the inside surface of a window facing outward in any such establishment; (3) an advertisement inside a retail establishment that sells Tobacco Products (other than solely through a vending machine) that is not placed on the inside surface of a window facing outward; or (4) an outdoor advertisement at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

Id. The tobacco manufacturers have agreed to remove all existing outdoor advertising and transit advertisements within 150 days after execution of the settlement agreement and have agreed that they will not place or cause to be placed any new outdoor advertisements or transit advertisements of tobacco products within any settling state. *See* A-41.

In addition, the tobacco manufacturers have agreed that they will not initiate or cause to be initiated any facial challenge to the enforceability or constitutionality of a statute, ordinance or administrative rule relating to tobacco control that was enacted prior to June 1, 1998 by any settling state or political subdivision of a settling state. *See* A-48.

ARGUMENT

Under Article III of the United States Constitution, a case or controversy must exist at all stages of appellate review. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994). " '[F]ederal courts do not have jurisdiction to review moot cases.' " *Buckley v. Archer-Daniels-Midland Corp.*, 111 F.3d 524, 526 (7th Cir. 1997) (quoting *Commodity Futures Trading Commission v. Hunt*, 591 F.2d 1211, 1224 (7th Cir. 1979)). This court has noted that " '[i]n general, a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.' " *Id.* (quoting *Stewart v. Taylor,* 104 F.3d 965, 969 (7th Cir. 1997)). The doctrine of mootness "is premised upon the belief that a court should not enjoy the power to decide an unnecessary question that cannot affect the rights of the litigants before it." *Rembert v. Sheahan*, 62 F.3d 937, 940 (7th Cir. 1995). A decision on an issue that has become moot should be vacated. *See Jordan v. Indiana High School Athletic Association,* 16 F.3d 785, 787 (7th Cir. 1994).

There is a serious question whether the issue decided by the district court in this case has been rendered moot by the tobacco settlement agreement. "A case is moot if there is no possible relief which the court could order that would benefit the party seeking it." *In re Envirodyne Industries, Inc.*, 29 F.3d 301, 303 (7th Cir. 1994). The district court held that the ordinance limiting tobacco advertisements is preempted by federal law. The plaintiff is an organization of entities that own outdoor advertising sign structures and lease them to, among others, tobacco manufacturers advertising their product. Now the tobacco manufacturers have agreed to remove all outdoor advertisements and to place no new advertisements outdoors.

In fact, the tobacco settlement agreement places far broader restrictions on outdoor advertisements than does the City's ordinance. While the City ordinance allowed cigarette advertisements along interstate highways, on CTA vehicles, at Wrigley Field, Comiskey Park, the United Center and Soldier Field, and in commercial and manufacturing districts, under the settlement agreement, the tobacco manufacturers have agreed not to advertise outdoors in these locations. Therefore, the plaintiff's member entities will not be able to lease advertising space to advertise cigarettes despite the injunction issued by the district court in this case.

There is a minor difference between the settlement agreement and the ordinance: the settlement agreement may allow some small signs—no more than 14 square feet in size—on premises selling tobacco products that are not allowed under the ordinance, while barring other signs that the ordinance does allow on such premises—electrical signs larger than 14 square feet which the ordinance allows on premises licensed to sell tobacco. This minor difference, however, does not affect the plaintiff's ability to lease advertising space to tobacco manufacturers. Under the settlement agreement, tobacco manufacturers have agreed that

they will not initiate any challenge to the enforceability of an ordinance concerning tobacco control, like the City's ordinance. Thus, pursuant to the settlement agreement, the City can enforce its ordinance against the tobacco manufacturers, who have agreed not to challenge it. The manufacturers, therefore, will not be leasing advertising space from the plaintiff's members. As a result of the tobacco settlement agreement, the relief ordered by the district court as to tobacco advertisements will no longer benefit the plaintiff.

Of course, the district court also declared the restrictions on the advertising of alcoholic beverages null and void, *see* A-25, but that was only because it concluded that the restrictions on alcohol advertisements were not severable from the restrictions on cigarette advertisements, *see* A-24. The district court did not reach the merits of plaintiff's claims that the restrictions on alcohol advertisements were preempted by state law or violated the First Amendment. Therefore, if the district court's decision on tobacco advertising is moot, its decision should be vacated, *see Jordan*, 16 F.3d at 787, and the plaintiff's claims concerning the limitations on advertisements of alcoholic beverages should be determined by the district court before this case proceeds on appeal.

For these reasons, this case should be remanded to the district court for a hearing on whether the injunction it issued should be vacated as moot, and if it is, for a decision on the plaintiff's claims on the limitation on advertisements for alcoholic beverages. A decision in the district court in the first instance would best serve the purpose of judicial economy. In the meantime, we request that briefing of this appeal be held in abeyance pending this court's decision on this motion.

CONCLUSION

For the above reasons, the City respectfully requests that this court remand this matter to the district court for a hearing on whether the injunction issued by the district court should be vacated as moot and that briefing of this appeal be held in abeyance pending a decision on this motion.

Respectfully submitted,

BRIAN L. CROWE
Corporation Counsel
of the City of Chicago

By: MARDELL NEREIM
MARDELL NEREIM
Assistant Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
30 North LaSalle Street
Room 800
Chicago, IL 60602

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

December 21, 1998

No. 98-3191

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INCORPORATED, an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, et al.,

Defendants-Appellants.

Appeal From the United States District Court
For the Northern District of Illinois,
Eastern Division.

No. 97 C 7619

Milton I. Shadur,
Judge.

The following is before the court:

1. MOTION FOR REMAND TO DISTRICT COURT FOR A HEARING ON VACATING INJUNCTION ON GROUNDS OF MOOTNESS AND TO HOLD BRIEFING IN ABEYANCE PENDING A DECISION ON THIS MOTION, filed on December 3, 1998, by counsel for the appellants.

2. RESPONSE IN OPPOSITION TO MOTION FOR REMAND, filed on December 9, 1998, by counsel for the appellee.

3. SUPPLEMENTAL RESPONSE IN OPPOSITION TO MOTION FOR REMAND, filed on December 11, 1998, by counsel for the appellee.

IT IS ORDERED that #1 is DENIED. Briefing will proceed as follows:

1. The brief and required short appendix of the appellants are due by January 19, 1999.

2. The brief of the appellee is due February 19, 1999.

3. The reply brief of the appellants, if any, is due March 5, 1999.

Note: The parties are advised that Rule 26(c), Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates of briefs are specifically set by order of this court. All briefs are due by the dates ordered.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416

D.C. No.
CV-97-05076-RJB

JAMES R. LINDSEY: SUN CHA LINDSEY, and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA-PIERCE COUNTY BOARD OF HEALTH; FEDERICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA,
a municipal corporation,

Defendants.

Filed February 14, 2000

Before: William C. Canby, Jr., Melvin Brunetti, and Diarmuid F. O'Scannlain, *Circuit Judges.*

ORDER; Concurrence by Judge O'Scannlain

ORDER

The opinion filed on November 19, 1999 and published at 195 F.3d 1065 is amended to include Judge O'Scannlain's specially concurring opinion attached hereto.

O'SCANNLAIN, Circuit Judge, specially concurring:

I concur in the thorough and well-reasoned opinion of the court, which faithfully applies Supreme Court precedent governing FCLAA preemption, as set forth in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). I write separately

only to note that in recent decisions outside of the FCLAA context, the Court appears to be moving toward an approach to preemption issues that is more pragmatic (rather than strictly textual) and more deferential towards state law. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995) (analyzing ERISA preemption).

The Court has made clear, however, that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (rejecting the proposition "that other courts should ever conclude that [the Supreme Court's] recent cases have, by implication, overruled an earlier precedent"). Thus we must follow *Cipollone*, rather than collateral intervening cases addressing preemption in different areas of the law. With this observation, I join wholeheartedly in the opinion of the court.